TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. [redacted]26.

VANDALIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA EX REL. THE CITY OF SOUTH BEND.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

[redacted]

(20,239.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 282.

VANDALIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA *EX REL.* THE CITY OF SOUTH BEND.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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1 IN THE STATE OF INDIANA:

In the Supreme Court.

Be it remembered, that heretofore, to-wit: On the 13th day of June, 1905, the same being the 20th Judicial Day of the May Term, 1905 of said Court, the Vandalia Railroad Company, by J. G. Williams, Samuel Parker and Anderson, Du Shane and Crabill, its counsel, filed in the office of the Clerk of the Supreme Court of Indiana, a transcript of the record and proceedings of the St. Joseph Circuit Court of said State, in a cause wherein the State of Indiana, on the relation of the City of South Bend was plaintiff, and the Terre Haute and Logansport Railway Company was defendant, together with an assignment of errors endorsed thereon; which transcript and assignment of errors was filed in term and is in the words and figures following, to-wit:

Be it remembered, that among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered, etc., in the Circuit Court of the County of St. Joseph, State of Indiana, are the following in the cause of State of Indiana *ex rel.* City of South Bend *vs.* Vandalia Railroad Company and numbered 9750, to-wit:

2 In the Supreme Court of the State of Indiana.

—— Term, 1905.

THE TERRE HAUTE & LOGANSPORT RAILWAY COMPANY, Appellant,
vs.
THE STATE OF INDIANA *ex Rel.* THE CITY OF SOUTH BEND, INDIANA, Appellee.

Appeal from the St. Joseph Circuit Court.

John G. Williams, Samuel Parker, Anderson, Du Shane & Crabill, Attorneys for Appellant.

Assignment of Errors—next page.

3 THE TERRE HAUTE & LOGANSPORT RAILWAY COMPANY, Appellant,
vs.
THE STATE OF INDIANA *ex Rel.* THE CITY OF SOUTH BEND, INDIANA, Appellee.

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5 *Transcript.*

Pleas before the Honorable Walter A. Funk, judge of the *sixtieth* judicial circuit of the State of Indiana, and *ex-officio* judge of the St. Joseph circuit court, at a term of said court held at the court-house in the city of South Bend, in St. Joseph county, Indiana, commencing on the first Monday of May, 1904.

In the St. Joseph Circuit Court, May Term, 1904.

STATE OF INDIANA, *County of St. Joseph:*

STATE OF INDIANA *ex Rel.* THE CITY OF SOUTH BEND
vs.
THE TERRE HAUTE & LOGANSPORT RAILWAY COMPANY.

Be it remembered that on the 2nd day of May, 1904, the same being the first judicial day of the May term, of the St. Joseph Circuit Court, the following proceedings were had in the above entitled cause:

Filing of Verified Complaint and Petition.

Comes now the City of South Bend, Indiana, the relator herein, and files in open court its verified complaint and petition wherein it asks that a Writ of Mandate issue out of this court commanding and directing the said defendant to open up its tracks and yards within the intersection of its right of way in said city of South Bend, Indiana, and the highway known and designated as Elmira street

now Calvert street, and to make the road bed conform to the established grade of said street at said intersection and to plank the crossing of same and to make the same safe, and convenient for the passage of persons and vehicles, and which said complaint and petition is in the words and figures as follows, to-wit:

In the St. Joseph Circuit Court, May Term, 1904.

STATE OF INDIANA, *St. Joseph County, ss:*

STATE OF INDIANA on the Relation of THE CITY OF SO. BEND
vs.
TERRE HAUTE AND LOGANSPORT RAILWAY COMPANY.

6 *Verified Complaint & Petition.*

Plaintiff complains of defendant and alleges:—

First. That the City of South Bend is a municipal corporation organized under and by virtue of the laws of the State of Indiana.

Second. That as such municipal corporation, it has the charge, control of the custody of the streets, alleys and highways within the limits of the said City.

Third. That the said defendant, Terre Haute and Logansport Railway Company is a corporation operating a line of railway from Bronson street in said city of South Bend to the southern limits of the said city.

Fourth. That said defendant upon the 10th day of November 1884, was granted a certain franchise by the city of South Bend, to operate their said railway and to cross the streets and alleys of the city of South Bend with the same, which franchise is known as ordinance number 694 and was passed by the Common Council of the City of South Bend and approved by the Mayor thereof upon the 10th day of November, 1884, a copy of which ordinance is hereto attached marked "Exhibit A," and made a part of this complaint.

Fifth. That the said Railway Company accepted said franchise and have acted under the same ever since that time.

Sixth. That said franchise was granted to the defendant on the express condition that when the railroad crossed any street or alley it should be made to conform strictly to the grade of said street or alleys as was established or might thereafter be established; and that said defendant should so construct and maintain its said railroad so as to cause the least obstruction possible of the passage of persons and vehicles over the same.

Seventh. That there is a certain street or highway known as Calvert street, which was formerly known as Elmira street;
7 that such Calvert street has been a public highway with established grade for four years, and more last past, and used by the people as such; that said Calvert street runs through the City of South Bend, east and west and intersects the real property right of way and tracks of the defendant; said intersection being described as follows, to-wit —

A strip of land sixty (60) feet wide, thirty (30) feet on each side of the following described center line.

Beginning at the southwest corner of the northwest quarter of the southwest quarter of section thirteen (13) township thirty-seven (37) north of range two (2) east running thence east to the east line of the right of way of said railway company.

Eighth. That the said defendant has never opened its real property right of way or tracks so intersected or made to conform to the grade of said Calvert street where the same intersects and crosses its property as hereinbefore described, but, on the contrary has laid without consent of the plaintiff, additional tracks across said intersection, and has refused and still refuses to open said described intersection, and make their road bed conform to the grade of said street; that said intersection and railroad crossing has existed for more than four years last past.

Ninth. That the said plaintiff, the City of South Bend, by and through its proper officers, did on the 26th day of October, 1903, adopt a resolution instructing the said defendant to open up Calvert street, formerly Elmira street, at a point where said street intersects their yard and tracks and to plank the said crossing in the usual manner.

Tenth. That the said plaintiff, by and through its proper officers, did on the 18th day of December, 1903, serve upon the defendant the following notice, to-wit:

8 "You are hereby notified that at the regular meeting of the Common Council held on the 28th day of October, 1903, a resolution was adopted instructing your company to open Calvert street formerly Elmira street, at a point where said street intersects your yards and to plank said crossing in the usual manner.

You are hereby notified to accomplish the opening and planking of said crossing within the least possible delay.

BOARD OF PUBLIC WORKS OF THE
CITY OF SOUTH BEND.
WILLIAM A. McINERNY.
EDWIN NICAR.
JOHN W. PAPCZYNSKI."

Twelfth. That the said defendant has wholly failed neglected and refused and still fails, neglects and refuses to open up their right of way, tracks and yards and fails and refuses to make their grade of the railroad conform to the grade of said Calvert street where it intersects their road bed, and fail- and refuse- and still, fail and refuse to comply with the terms of their franchise heretofore set out.

Wherefore, the Relator prays the court for a writ of mandamus requiring said defendant to open up said right of way, tracks and yards, at said intersection and to make their road bed conform to the grade of said Calvert street where the same intersects their railroad and to plank the crossing of the same and to make the same safe and convenient for the passage of persons and vehicles over the same.

FRANK H. DUNNAHOO,
H. R. WEIR,
Plaintiff's Attorneys.

STATE OF INDIANA, *St. Joseph County, ss:*

9 Edward J. Fogarty, being duly sworn upon his oath says that he is the duly elected and qualified mayor of the city of South Bend, the Relator in the above cause, that he has read the foregoing complaint and that the matters therein mentioned are true to the best of his knowledge and belief.

EDWARD J. FOGARTY.

Subscribed and sworn to before me, this 12 day of April, 1904.

NELSON A. KYSER,
Notary Public.

My commission expires Sept. 3, 1906.

Ordinance No. 694.

An Ordinance Granting to the Terre Haute and Logansport Railroad Company, its Successors and Assigns, the Right to Construct, Maintain and Operate Its Railroad in the City of South Bend.

SECTION 1. Be it ordained by the Common Council of the city of South Bend, that subject to the provisions of this ordinance, the Terre Haute and Logansport Railroad Company, its successors and assigns is hereby granted the privilege of constructing, maintaining and operating its railroad, embracing its main and side tracks within the limits of the City of South Bend, Indiana, upon the profile adopted by said Company, and upon the following route, to-wit:

Entering the said City of South Bend on the south at the southern boundary of Samuel C. Stull's first addition to South Bend, as the said addition appears of record in the recorder's office of St. Joseph county, Indiana; and running thence north and easterly to a junction with the tracks of what is known as the Lake Shore and Michigan Southern Railroad at a point between Main and Michigan streets in said city of South Bend.

SECTION 2. This grant is made subject to the private rights
10 of the owners of real estate over which said railroad may be located, and upon the express condition that when said railroad crosses any street or alley it shall be made to conform strictly to the grade of such street or alley as heretofore established, or as the same may hereafter be established by the city authorities unless the council upon application of said company shall consent to a variation of said grade.

SECTION 3. At all street crossings, the said Terre Haute and Logansport Railroad Company, its successors and assigns, shall so construct its said railroad as to cause the least obstruction possible to the passage of persons and vehicles, and shall always maintain said crossings so as to make the same safe and convenient for the passage of persons and vehicles, and shall at all times when required by the Common Council of the City, and at its own expense, put on flagmen, at any and all of said crossings, and said Company, its successors and assigns, shall always make and maintain under the line of its railroad within the city sufficient culverts and drains

to admit of the free passage of water along the streets and alleys affected in any manner by the construction of said railroad.

SECTION 4. If said railroad company, its successors and assigns after notice, fail or refuse to do any or all of the things required by this ordinance, then the same may be done under the orders of this council by the street commissioner of the city, and the expense of doing the same with a penalty of twenty per cent. be recovered from said company, its successors and assigns in any court of competent jurisdiction.

SECTION 5. The said railroad Company, its successors, and assigns, shall be subject to all ordinances and regulations now in
11 force or any reasonable regulations or ordinance that may hereafter be made or passed by the Common Council of said City in relation to the speed of trains in or through the city, or for the security of citizens and others from the running of trains in or through said city, and to all reasonable regulations and ordinances concerning the running and operation of railroads in said city.

SECTION 6. The said company, its successors or assigns, shall not obstruct the free passage of persons, or vehicles without danger or inconvenience; and shall in all cases, when a train is going out or coming in ring the engine bell so as to give notice of its arrival or departure.

Approved Nov. 10, 1884.

GEO. W. LOUGHMAN, *Mayor.*"

Attest:

B. B. KIMBLE, *Clerk.*

Transcript.

and the Court having seen and examined said Petition and Complaint, and being duly advised in the premises, on the motion of the relator herein, hereby orders that a Writ issue commanding said defendant to open up its right of way, tracks and yards within the street intersection hereinafter described, and to make the road bed of its railway tracks at said intersection conform to the established grade of said Calvert street and to plank the crossing of same where the said Calvert street intersects and crosses its right of way and tracks, which intersection is described as follows:

A strip of land sixty (60) feet wide, thirty (30) feet on each side of the following described center line:

Beginning at the southwest corner of the northwest quarter of the southwest quarter of section thirteen (13) township thirth-seven (37) North Range two (2) east, running thence east to the east line of the defendant's right of way, all within the said city of South
12 Bend, Indiana, and to make the said crossing safe and convenient for the passage of persons and vehicles over the same, or in default thereof, that it appear before said Court at the Court House in the City of South Bend, Indiana, on the 12th day May, 1904, at nine o'clock, to show cause, if any it have, why the same should not be done.

It is further ordered that the Clerk of this court issue to said

defendant a certified Alternative Writ of Mandate as directed by this order, under his hand and seal of said court and deliver the same to the Sheriff of said county, who shall make due return thereof, and which alternative writ of Mandate is in the words and figures as follows, to-wit:

STATE OF INDIANA, *St. Joseph County, ss:*

In the St. Joseph Circuit Court, May Term, 1904.

STATE OF INDIANA *ex Rel.* CITY OF SOUTH BEND, INDIANA,
vs.
TERRE HAUTE & LOGANSPORT R. R. Co.

Alternative Writ of Mandate.

State of Indiana to the Terre Haute and Logansport Railway Company:—

Whereas, the City of South Bend, Indiana, as relator in the above entitled cause, has filed in this Court its sworn complaint alleging that it is a municipal corporation organized under the laws of the State of Indiana, and that as such corporation, it has charge, control and custody of the streets, alleys and highways within its limits; that the defendant, the Terre Haute and Logansport
13 Railway Company, is a corporation operating a line of railway within the limits of said City; that the said defendant is operating said line under a certain franchise granted by said city known as Ordinance No. 694, copy of which Ordinance is made a part of the complaint; that said franchise was granted to the defendant on the express condition, that when the railway crossed any street or alley it should be made to conform strictly to the grade of said street or alley as was established or was thereafter established; that said defendant should so construct and maintain its railroad so as to cause the least obstruction possible to the passage of persons and vehicles over the same; that there is a certain street or highway known as Calvert street, formerly Elmira street; that said Calvert street has been for many years a highway and used by the people as such; that said Calvert street runs through the said City of South Bend east and west, and intersects the real property right of way and tracks of the defendant said intersection being described as follows, to-wit:

A strip of land sixty (60) feet wide, thirty (30) feet on each side of the following described center line: Beginning at the southwest corner of the northwest quarter of the southwest quarter of section thirteen (13), township thirty-seven (37), north range two (2) east, running thence east to the east line of the right of way of said railway company.

That the said defendant has never opened its real property right of way or tracks so intersected, or made the road bed to conform to the established grade of said Calvert street; that on the 26th day of October, 1903, the said City of South Bend adopted a resolution instructing said defendant to open up said Calvert street at its inter-

section, and to plank the crossing in the usual manner; that
14 on the 18th day of December, 1903, the said City served notice upon the said defendant to that effect a copy of which is set forth in the complaint; that the said defendant has wholly neglected, failed and refused to open up said right of way and yards, and still fails, neglects and refuses to do same, or to make the grade of the railway conform to the grade of said Calvert street at said intersection, or to comply with the terms of their franchise referred to.

And praying that an alternative writ of mandate be issued commanding you, the said railway company, to open your said tracks and yards, and to make your road bed conform to the grade of said Calvert street where the same intersects the railway, and to plank the crossing of same, and to make the same safe and convenient for the passage of persons and vehicles over the same.

Now therefore, you are hereby commanded to open your tracks and yards within the street intersection hereinafter described and to make the road bed of your railroad tracks at said intersection conform to the established grade of said Calvert street, and to plank the crossing of same where the said Calvert street intersects and crosses your right of way and tracks, which intersection is described as follows, to-wit:—

A strip of land sixty (60) feet wide, thirty (30) feet on each side of the following described center line:

Beginning at the southwest corner of the northwest quarter of the southwest quarter of section thirteen (13) Township thirty-seven North Range two (2) east, running thence east to the east line of your right of way, and to make said crossing safe and convenient for the passage of persons and vehicles over the same, or in default thereof, that you appear before said Court at the Court house
15 in the City of South Bend on the 12th day of May, 1904, to show cause if any you have, why the same should not be done, and have you then and there this writ.

Witness the Clerk and Seal of said Court this 2nd day of May, 1904.

[SEAL.] GEO. H. ALWARD,
Clerk of St. Joseph Circuit Court.

And be it further remembered that on the 12th day of Mav 1904 the same being the 10th Judicial day of the May Term, 1904, of the St. Joseph Circuit Court, the following proceedings were had, to-wit:—

Transcript.

No. 9750.

STATE OF INDIANA *ex Rel.* THE CITY OF SOUTH BEND
vs.
TERRE HAUTE AND LOGANSPORT R. R. Co.

Come- now the defendant, the Terre Haute and Logansport Railway Company, in the above entitled cause and files its demurrer to

the verified complaint Petition and Alternative writ of Mandate herein.

Be it remembered that afterwards to-wit, on Tuesday, September 13, 1904, the same being the second judicial day of the September Term, 1904, of said Court, begun and held as aforesaid, and before the same honorable judge as aforesaid the following further pleas and proceedings were had in said cause, as follows, to wit:—

STATE OF INDIANA *ex Rel.* CITY OF SOUTH BEND, INDIANA,
vs.
TERRE HAUTE & LOGANSPORT R. R. Co.

16 Mandamus.

Now again come the parties by counsel and the defendant files its demurrer to verified complaint and alternative writ herein in these words, to-wit:—

Filing of Demurrer to Verified Complaint.

STATE OF INDIANA, *St. Joseph County, ss:*

In the Circuit Court, September Term, 1904.

THE STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND
vs.
THE TERRE HAUTE & LOGANSPORT RAILWAY COMPANY.

Demurrer.

1. The defendant demurs to the verified complaint or application for writ of mandate herein, and, for ground of demurrer, says that said verified complaint or application does not state facts sufficient to constitute a cause of action against the defendant.

2. And the defendant demurs to the alternative writ of mandate issued herein, and for ground of demurrer, says that said alternative writ does not state facts sufficient to constitute a cause of action against the defendant.

3. And the defendant demurs to the verified complaint or application for an alternative writ of mandate and to the alternative writ of mandate herein, and for ground of demurrer says that the same do not state facts sufficient to constitute a cause of action against the defendant.

4. And the defendant demurs to the verified complaint or affidavit and to the motion and alternative writ of mandate herein, and, for ground of demurrer, says that the same do not state facts sufficient to constitute a cause of action against the defendant.

5. And the defendant demurs separately and severally to
17 the verified complaint, motion and alternative writ of mandate herein, and, for ground of demurrer, says that the plaintiff has no legal capacity to sue.

ANDERSON, DU SHANE & CRABILL,
SAMUEL PARKER,
Attorneys for Defendant.

And be it further remembered that afterwards, to-wit on Monday, October 24th, 1904, the same being the thirty-seventh judicial day of the September Term, 1904, of said court begun and held as aforesaid and before the same honorable judge as aforesaid, the following further pleas and proceedings were had in said cause, as follows, to-wit:

Transcript.

No. 9750.

STATE OF INDIANA *ex Rel.* CITY OF SOUTH BEND, INDIANA,
vs.
TERRE HAUTE & LOGANSPORT RAILROAD COMPANY.

Mandamus.

Now again come the parties by counsel, and defendant's demurrer being now submitted to the court is, upon due consideration, by the court overruled, to which ruling of the Court, the defendant excepts and thereupon the defendant files its answer herein, in these words: (Insert.)

And be it further remembered that afterwards, to-wit: on Monday, February 6, 1905, the same being the first Judicial day of the February Term, 1905, of said Court begun and held as aforesaid, the following further pleas and proceedings were had in said cause, as follows, to-wit:—

9750.

STATE OF INDIANA *ex Rel.* THE CITY OF SOUTH BEND
vs.
18 THE TERRE HAUTE AND LOGANSPORT RAILWAY COMPANY.

Answer Withdrawn.

Now again come the parties by counsel, and the defendant, now by leave of the court, withdraws its three paragraphs of answer heretofore filed and now files return to alternative writ and answer to application in these words,—

Return to Writ & Answer to Application Filed.

STATE OF INDIANA, *St. Joseph County, ss:*

In the Saint Joseph Circuit Court.

THE STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND
vs.
THE TERRE HAUTE & LOGANSPORT RAILWAY COMPANY.

Return to Alternative Writ of Mandate, etc.

The Terre Haute and Logansport Railway Company, for return to the alternative writ of mandate issued herein and for answer thereto and to the verified petition filed herein and waiving the service of alternative writ, says that it admits that the relator, the City of South Bend, is a municipal corporation organized under the laws of the State of Indiana, and that, as such, it has charge and control of the streets and alleys within its limits; that this defendant is a railway corporation owning and operating a line of railway from the City of Terre Haute, Indiana, to the southern limits of the City of South Bend and to Bronson street in said city; that, on November 10, 1884, the Common Council of said City passed the ordinance numbered 694, a copy of which is filed with the verified petition herein whereby the Terre Haute & Logansport Railroad Company, its successors and assigns, were granted the right to construct, maintain, and operate a railroad in said city; that said Terre Haute & Logansport Railroad Company entered said
19 City and constructed its railroad tracks from the then south line thereof to said Bronson street, and thereafter maintained and used said tracks for railroad purposes until it ceased to own said railroad on December 1, 1898, as hereinafter shown.

And the defendant further admits that it was served with notice from the Board of Public Works of said City of South Bend, on October 28, 1903, to open Calvert, formerly called Elmira street in said city, across its yards and tracks and to plank the crossing in the usual manner, and that it has failed and refused to lay plank between its rails and to make a crossing over its tracks at their present grade, safe and convenient for persons and vehicles, and at the place where the relator claims said Calvert or Elmira Street now exists.

And the defendant says that it so failed and refused to make a crossing over its tracks at present grade at said place, and further that it ought not to be required to make any such crossing at said place by reason of the following facts:

At the time said ordinance number 694 was passed and when the Terre Haute & Logansport Railroad Company built its said railroad into the City of South Bend, the place where said Calvert or Elmira street is now claimed to be was outside the limits of said city and was not within the boundaries of any town or city until

the 16th day of June, 1887, when certain territory, including that over and on which the relator now claims said Calvert street lies, was incorporated as a town under the name of Myler, and continued to be a town and to be known by that name until the — day of —— 1892, when the same was annexed to and became a part of said City of South Bend. On August 12, 1891, when said territory was within the limits of said Town of Myler, the petition of Frank S. Stover and thirteen others was filed with the Board of Trustees of said Town for the establishment of a street in said town to be known as Elmira street, over and on the ground where the relator now claims said street is located. This petition named, among others, "The Vandalia Railway Co." and "The Terre Haute & Logansport Railway Co." as persons through whose lands said street would pass and be effected thereby; and the same was referred to three commissioners appointed by said Board of Trustees to assess the damages and benefits to land owners whose lands would be effected by said street. The time fixed by said Board of Trustees for the meeting of said Commissioners to make their appraisement of damages and benefits was September 29, 1891, at nine o'clock A. M., of which due notice was given them in the manner provided by law. Upon the order of said Board of Trustees notice of said meeting of the Commissioners to be held on said September 29, 1891, at nine o'clock A. M., was issued by the then Clerk of said Town, on September 7, 1891, and delivered to the marshal of said town for service. This notice was filed with the said town clerk on September 9, 1891, with the town marshal's return thereon, showing service on the Vandalia Ry. Co., by reading on September 8, 1891. The following is a full and complete copy of said return:

"*Marshal's Return.*

TOWN OF MYLER:

Received the within notice this 8th day of September, 1891, and served the same by reading upon each of the following named persons at the dates set opposite their names:

Names.	Date of service.	Names.	Date of ser.
S. C. Stull.....	Sept. 8/91	Jas. Oliver.....	Sept. 8/91
B. Kimble.....	"		
Ed. C. Witwer...	"		
David Bowman..	"		
Sophia Oltsch....	"		
Emma Foegley..	"		
D. M. Shively.....	"		
Flora Beitner.....	"		
Vandalia Ry. Co.	"		

And I forthwith deliver the same to the town clerk this 9th day of September, 1891.

Witness my hand of this date.

B. RUPEL,
Town Marshal.

On said September 29, 1891, the said Commissioners met at the place named in said notice and appraised the benefits and dam-ges to the lands affected by said street, and, thereafter, on October 7th, 1891, made their report to the Board of Trustees of said Town. On October 26th, 1891, the Board of Trustees of said Town accepted the report of said commissioners and passed a resolution appropriating lands described in said report for street purposes and declared the same appropriated to the use of the public as a public street and highway to be known as Elmira Street. Among the lands described in said report and attempted thereby and by said resolution to be appropriated for said street was land then owned by The Terre Haute & Logansport Railroad Company, and used by it for railroad purposes and which is the same land over and upon which the relator herein contends that said Calvert Street or Elmira Street was located and established and now exists.

And this defendant says that said notice was not served upon The Terre Haute & Logansport Railroad Company, which then owned said land, and said railroad, and that it did not by
22 any officer, agent, or attorney, attend said meeting of the commissioners, nor any meeting of said Board of Trustees at which any proceedings were had in respect to the locating of said street, and that it was not and did not become a party to said proceedings in any manner whatever. And this defendant further says that the Vandalia Ry. Co. at the time said notice was served had no title to nor interest either in said land or said Terre Haute and Logansport Railroad and never has has any such title or interest.

And this defendant further says that, on January 1, 1883, the said Terre Haute & Logansport Railroad Company executed its deed of trust or mortgage to Benjamin Harrison, Trustee, whereby it conveyed to him its railroad then constructed and lying between Rockville, in the County of Parke, in the State of Indiana, and Logansport, in the County of Cass, in the State of Indiana, and, also, the extension of said railroad to be constructed from its then northern terminus in the said City of Logansport to the said City of South Bend, in the County of St. Joseph, together with the right of way, road-bed, and depot grounds, and all other lands, rights, franchises, and property appertaining to or connected with the said railroad and said extension, which the said The Terre Haute & Logansport Railroad Company then owned or might thereafter acquire or become entitled to, to secure the payment of one million dollars, represented by one thousand one thousand dollar bonds executed by the said railroad company and payable to said Benjamin Harrison, Trustee, or bearer. Said trust deed or mortgage was duly acknowledged by said railroad company before an officer authorized by law to take acknowledgements of mortgages, and was recorded in the office of the recorder of St. Joseph County, Indiana, within forty-five days from the time of its execution.

On December 30, 1896, said railroad company, having made default in the performance of the conditions of said trust
23 deed or mortgage, said Benjamin Harrison, Trustee, commenced an action in the Circuit Court of the United States

for the District of Indiana, against said The Terre Haute & Logansport Railroad Company and another for the foreclosure of said mortgage by filing therein his bill of complaint upon which a subpœna for said Railroad Company was duly issued and served. Thereafter, the said Circuit Court of the United States having then and there full jurisdiction of the subject matter of the action and of the parties, found and adjudged in said cause that there was due the said
24 Benjamin Harrison, Trustee, from said Railroad Company on account of the bonds secured by said mortgage the sum of $1,060,000.00, and adjudged and decreed that, if said sum were not paid within a time then fixed by the Court, the mortgaged property be sold by the Master in Chancery of said Court to make said sum. The said Railroad Company failed to pay said sum, whereupon said Master in Chancery, William P. Fishback, after giving notice as required by the decree and orders of the Court made in said cause, sold all of said mortgaged property to Joshua Twing Brooks at and for $1,060,000.00. The said Brooks paid the amount of his bid and designated this defendant, The Terre Haute & Logansport Railway Company, as the party to whom said property should be conveyed. Thereupon, and on December 1, 1898, the said Master in Chancery executed his deed by which he conveyed to the defendant all of said mortgaged property ordered by said Court to be sold and sold by him to said Brooks, which included and includes the lands, rights, franchises and all other property acquired, and, at the time of the rendition of said decree owned by said Terre Haute & Logansport Railway Company in the said City of South Bend, and particularly the land, tracks and yard over and on which the relator herein claims and contends that said Calvert or Elmira Street is located and established. On December 5, 1898, said Master in Chancery made his report to said Court showing the sale of said property to said Brooks and the payment of the purchase price by him and the execution of said deed to this defendant and asked that said sale and the execution and delivery of said deed be confirmed and approved. Thereupon, said court ordered that said report be filed as of December 1, 1898, and confirmed and approved said deed and the execution and delivery thereof to this defendant, who had received complete possession
25 of all said property so conveyed to it by said deed at midnight of November 30, 1898. And prior to November 30, 1898, this defendant paid to said Brooks the full amount of his bid aforesaid and ever since that date has owned and been in possession of and now owns and is in possession of the property conveyed to it by said deed.

And the defendant says that said Benjamin Harrison, Trustee, the grantee in said trust deed, was not a party to said proceedings had before and by the Board of Trustees of the town of Myler for establishing and locating said Elmira Street and neither was the holder of any of the bonds secured by said trust deed, and no notice of said proceedings was given to said Harrison, Trustee, or to any bondholder, and neither had any notices or knowledge thereof, and

no damages for the opening of the street were assessed, paid or tendered to either.

At the time of the purchase of said mortgaged property by said Brooks, and of the payment of the purchase price therefor by him and of the conveyance of said property to this defendant as aforesaid, neither he nor the defendant had any notice or knowledge of said proceedings to locate said Elmira Street, or of the existence of any street at the place across said tracks and yards where the relator now claims said street to be.

And this defendant says that in this action it is sought to appropriate its property acquired by virtue of the decree aforesaid rendered in the Circuit Court of the United States, for the district of Indiana, without due process of law and without compensation, in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant now claims immunity under said Fourteenth Amendment from having its property taken from
26 it by means of this action without compensation and without due process of law.

And the defendant further says that for some time the relator has claimed and particularly in the year 1901, it claimed, that, by virtue and force of said proceedings had by and before the Board of Trustees of the Town of Myler, and not otherwise, said Clavert or Elmira Street was located and established across the right of way, land, tracks, and yard of this defendant, all of which the defendant, by reason of the facts hereinbefore set forth, in good faith denied. Thereupon, and on January 17, 1902, for the purpose of adjusting and settling the said conflicting claims of the relator and settling the said conflicting claims of the relator and the defendant, the relator, acting by its then Board of Public Works, made and entered into a contract whereby the defendant agreed to construct a steel viaduct, above and across its tracks at said Elmira Street where claimed by the relator, and the relator agreed to construct the approaches thereto, and each agreed to perform the other agreements set forth in said contract which is in writing and which was reported to the Common Council of said City of South Bend, which, by ordinance duly passed and enacted, ratified and approved said contract. Said ordinance and said contract are in the following words and figures, to-wit:

Ordinance.

An ordinance ratifying a contract between the Department of Public Works and the Terre Haute and Logansport Railway.

Be it ordained by the Common Council of the City of South Bend that the within contract, made on the 17th day of January, 1902, between the Department of Public Works and the Terre Haute and Logansport Railway Company is hereby ratified and approved.

27 This agreement made this 17th day of January, 1902, between the City of South Bend, by and through its Board of Public Works and the Terre Haute & Logansport Railway Company:

Witnesseth:—That said Railway Company agrees to construct a steel viaduct above and across its tracks at Elmira Street in the City of South Bend according to the drawings and specifications attached hereto and made a part of this agreement. Such viaduct shall be in lieu of a grade crossing at that point and upon completion shall be used by the City of South Bend for highway purposes. Such highway shall be of a height affording a clearance of twenty-two (22) feet between the top of rail and bottom of viaduct, and shall have a paved roadway of thirty (30) feet in width and sidewalks of eight (8) feet in width in addition on each side. When the City of South Bend shall have in hand sufficient money with which to build the approaches to said viaduct and through its Board of Public Works and Common Council shall have ordered these approaches built, and said council shall have appropriated funds necessary for the completion of such approaches, then the said Railway Company agrees to construct said viaduct upon receiving written notice from the City of South Bend.

It is agreed that said City has a right to construct said approaches within the limits of said Elmira Street upon the property of said Railway Co. And it is agreed and understood that said viaduct and approaches shall be in course of construction at the same time.

Upon completion of said viaduct and the necessary approaches to said viaduct, said City agrees to thereafter maintain and keep in repair said approaches and said viaduct for all time.

28 This contract shall become binding upon ratification by ordinance of the Common Council of said City, and acceptance in writing of said Railway Company.

29 Witness our hands and seals this 17th day of January, 1902.

BOARD OF PUBLIC WORKS.
ARTHUR L. HUBBARD.
SAM LEEPER.
CHAS. L. GOETZ.
THE TERRE HAUTE & LOGANSPORT RAILWAY CO.,
By J. J. TURNER, *Vice-President.*

Attest:—
[SEAL.] S. B. LIGGETT, *Sec'y.*

And the defendants says that the construction of said steel viaduct according to the plans and specifications will require an expenditure by it of $30,000, and yet, it avers, that, since the ratification of said contract, it has always been and now is ready able and willing to perform all the agreements contained in said contract to be performed by it. But the defendant says the relator has performed none of the agreements contained in said contract to be performed by it, and that it has not given to the defendant any written or other

notice to construct said viaduct according to the provisions of said contract. The Street designated Elmira Street in said contract is the same street designated Calvert Street in the application and writ herein.

And the defendant says that at the times the verified application herein was filed and the alternative writ of mandate herein was issued and served, the relator had not, nor had the public, acquired the right to use the ground and space across its yards and tracks, where the relator claims said street to exist, as and for a street or highway in any other manner than by the said proceedings had by and before the Board of Trustees of said Town of Myler hereinbefore set out and it avers that said proceedings were wholly insuf-
30 ficient to establish a street or highway at said place as against it for the reasons hereinbefore set forth in this return.

Wherefore the defendant says that it ought not to be compelled to open said alleged street across its tracks and yard at grade as commanded by said alternative writ, and it prays judgment accordingly.

ANDERSON, DU SHANE & CRABILL,
SAMUEL PARKER, *Att'ys for Def't.*"

Thereupon the plaintiff now filed its demurrer to the answer and return in these words:—

Transcript. Demurrer to Answer Filed.

STATE OF INDIANA, *St. Joseph County:*

In the St. Joseph Circuit Court, February Term, 1905.

STATE OF INDIANA *ex Rel.* CITY OF SOUTH BEND, INDIANA,
vs.
TERRE HAUTE & LOGANSPORT RAILWAY COMPANY.

The plaintiff hereby demurs to the return to the Alternative Writ of Mandate herein and to the answer filed in the above entitled cause upon the ground and for the reason that the said return and answer do not state facts sufficient to constitute a return and answer to plaintiff's complaint and the Alternative writ issued herein.

F. H. DUNNAHOO,
H. R. WAIR, *Pl'ff's Att'ys.*"

Transcript.

And be it further remembered that afterwards, to-wit on
31 Friday, March 24, 1905, the same being the 41st judicial day of the February Term, 1905 of said court begun and held as aforesaid and before the same honorable judge as aforesaid, the following further pleas and proceedings were had in said cause, as follows, to-wit:

No. 9750.

STATE OF INDIANA *ex Rel.* THE CITY OF SOUTH BEND
vs.
TERRE HAUTE & LOGANSPORT RAILWAY COMPANY.

Mandamus.

Now, on this the 24th day of March, 1905, come again the parties by counsel, and the plaintiff's demurrer to defendant's answer and return to the verified application herein, and to the alternative writ of mandate issued thereon which answer and return is as follows—(here insert) is sustained by the court; to which ruling of the Court the defendant excepts.

And the defendant now refuses to make further or other answer and return to said application, and to the said Alternative Writ, and elects to stand upon said answer, and return filed herein, and upon the ruling of the Court, and the said demurrer thereto.

Finding.

Thereupon the court finds for the plaintiff; that said plaintiff is entitled to a peremptory writ of mandate, directing and compelling the defendant to do and perform the acts and things as set out in the affidavit and motion.

Judgment.

It is therefore considered, adjudged and decreed by the court that a peremptory writ of mandate issue out of and under the seal of this court to the defendant, The Terre Haute & Logansport Railway Company, commanding it to open up its said tracks and yards within the street intersection hereinafter described and to
32 make the roadbed of *their* said railroad tracks at said intersection conform to the established grade of Calvert Street, and to plank the crossing of the same where the said Calvert Street intersects and crosses the right of way and tracks of the defendant; said intersection being described as follows, to-wit: A strip of land 60 feet wide, 30 feet on each side of the following described center line; beginning at the southwest corner of the northwest quarter (¼) of the southwest quarter (¼) of section 13, Township 37 North, Range 2 East, runnign thence east to the east line of the right of *the right of* way of said railway company, and to make the said crossing safe and convenient for the passage of persons and vehicles.

And that the plaintiff recover of the defendant its costs herein laid out and expended, taxed at —.

And the defendant now objects to the said judgment and decree as made and entered in said cause, and files its written motion to modify and correct said judgment and decree, which motion is in the words and figures following, to-wit:—

Motion to Modify & Correct Judgment Filed.

"STATE OF INDIANA, *St. Joseph County, ss:*

In the Circuit Court, February Term, 1905.

THE STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND
vs.
THE TERRE HAUTE & LOGANSPORT RAILWAY COMPANY.

Motion to Modify Judgment.

The defendant objects to the judgment and decree of the court rendered herein for the reason that the same is so vague and uncertain in its terms that any peremptory writ of mandate cannot be obeyed, in this, that the grade of said Calvert Street is not
33 given in said decree. And the defendant moves the Court to amend and modify said judgment by specifying therein, with particularity, the grade to which its roadbed and tracks shall be made to conform.

ANDERSON, DU SHANE & CRABILL,
SAMUEL PARKER,
Attorneys for Defendant.

Motion to Modify & Correct Judgment Overruled.

which said motion the court overrules, to which ruling of the court the defendant excepts, and now presents its bill of exceptions, containing said motion, which is signed, and sealed and then filed, and made a part of the record in said cause, and reads as follows:—

Bill of Exceptions Filed.

"STATE OF INDIANA, *St. Joseph County, ss:*

In the St. Joseph Circuit Court, February Term, 1905.

STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND
vs.
TERRE HAUTE & LOGANSPORT RAILWAY COMPANY.

Defendant's Bill of Exceptions.

Be it remembered that on this 24th day of March, 1905, immediately upon the rendition of the judgment and decree in the above entitled cause the said defendant filed its motion to modify the judgment and decree, which motion is in the following words, to-wit:—

34 STATE OF INDIANA, *St. Joseph County:*

In the Circuit Court, February Term, 1905.

THE STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND

vs.

THE TERRE HAUTE & LOGANSPORT RAILWAY COMPANY.

Motion to Modify Judgment.

The defendant objects to the judgment and decree of the court rendered herein for the reason that the same is so vague and uncertain in its terms that any peremptory writ of mandate issued thereon cannot be obeyed in this, that the grade of said Calvert street is not given in said decree. And the defendant moves the court to amend and modify said judgment by specifying therein, with particularity, the grade to which its roadbed and tracks shall be made to conform.

ANDERSON, DU SHANE & CRABILL,
SAMUEL PARKER, *Attorneys for Defendant.*

Which motion the Court overruled, to which ruling of the Court the defendant excepted.

And the defendant now presents its Bill of Exceptions embracing said motion and the ruling of the Court thereon and the exception, and prays that the same may be signed, and sealed and made a part of the record in said cause, which is now done.

Signed Mar. 24, 1905.

WALTER A. FUNK, *Judge.*"

35 *Appeal Prayed.*

And the said defendant prays an appeal to the Supreme Court of the State of Indiana, from the said judgment and decree rendered herein; which appeal is granted on the said defendant filing an appeal bond, within 30 days, with the Clerk of the St. Joseph Circuit Court, in the penal sum of Three Hundred Dollars ($300) conditioned as required by law, with David E. Snyder and Samuel Parker as sureties, which sureties are now approved by the Court.

Signed Mar. 24, 1905.

WALTER A. FUNK, *Judge.*

O. K.
F. H. DUNNAHOO,
H. R. WAIR,
PARKER & CRABILL.

Transcript.

And be it remembered that afterwards, to-wit: on Friday, April 14, 1905, the same being the 59th judicial day of the February Term, 1905, of said court, begun and held as aforesaid, and before the same honorable judge as aforesaid, the following further pleas and proceedings were had in the above entitled cause, as follows, to-wit:

Appeal Bond Filed.

No. 9750.

STATE OF INDIANA *ex Rel.* CITY OF SOUTH BEND
vs.
T. H. & L. RY. CO.

Mandamus.

Now, on this the 15th day of April, 1905, comes the defendant and files its appeal bond herein the sureties on which have been approved by the Court, which said appeal bond is in these words,—

36 STATE OF INDIANA, *St. Joseph County, ss:*

STATE OF INDIANA *ex Rel.* THE CITY OF SOUTH BEND
vs.
TERRE HAUTE & LOGANSPORT R. R. CO.

Appeal Bond.

Know all men by these presents: That we, Samuel Parker and David E. Snyder are held and finally bound unto the City of South Bend, the relator in the above entitled cause, in the penal sum of Three Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, personal representatives and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of April, 1905.

The condition of the above obligation is such that, Whereas, on the —— day of March, 1905, the plaintiff in the above entitled cause recovered judgment against the Terre Haute & Logansport Railway Company the defendant in said cause, in the St. Joseph Circuit Court, in St. Joseph County, State of Indiana on a peremptory writ of mandate commanding the defendant to open up Elmira Street, otherwise called Calvert Street in said city across its yards and tracks and plank the same and make the crossing safe and convenient for travel, and also for the costs in the sum of $——, from which said judgment the said The Terre Haute & Logansport Railway Company has appealed to the Supreme Court of the State of Indiana.

Now, if the said The Terre Haute & Logansport Railway Company or its successor in ownership of the railroad and railroad property that may be made a party ro such appeal will prosecute said appeal to effect and abide by and perform the order of said Court and pay such judgment for costs which may be ren-
37 dered against it in said cause in said appeal, then this obligation to be void, otherwise to be and remain in full force and effect.

SAMUEL PARKER [SEAL.]
DAVID E. SNYDER [SEAL.]

STATE OF INDIANA, *Marshall County, ss:*

Before me, the undersigned, a notary public in and for said county and state on this the 15rh day of April, 1905, personally came Samuel Parker and David E. Snyder, and severally acknowledged the execution of the above bond.

Witness my hand and Notarial Seal,

[SEAL.] WILLIAM H. MATTHEW.

My Commission Cxpires March 18, 1907.

Filed and Recorder this 15rh day of April, 1905.

GEORGE H. ALWARD, *Clerk.*"

Transcript.

And be it remembered that afterwards, to-wit, on Saturday, May 13, 1905, the same being the 12th judicial day of the May Term, 1905, of said court, begun and held as aforesaid, and before the same honorable judge as aforesaid, the following further pleas and proceedings were had in said cause, as follows, to-wit:

No. 9750.

THE STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND

vs.

THE TERRE HAUTE AND LOGANSPORT RAILWAY COMPANY.

Mandamus.

38 Now, on this the 13th day of May, 1905, comes the defendant, The Terre Haute & Logansport Railway Company and files its præcipe for a transcript herein in the words and figures following, to-wit:

Præcipe Filed.

"STATE OF INDIANA, *Saint Joseph County, ss:*

In the Saint Joseph Circuit Court.

THE STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND

vs.

THE TERRE HAUTE AND LOGANSPORT RAILWAY COMPANY.

Cause No. 9750.

Præcipe for Transcript.

To George H Alward, clerk of the Saint Joseph circuit court of Saint Joseph county, Indiana:

You are hereby requested and directed to prepare and certify for appeal to the Supreme Court of the State of Indiana, a transcript of

the following specified pleadings, papers, records, entries and proceedings in the above entitled cause, to-wit:

1. The verified complaint or application for alternative writ of Mandate, filed May 2nd, 1904.
2. Entry and order directing alternative writ of Mandate to issue.
3. Alternative Writ of Mandate.
4. Order Book entry (O. B. 44, p. 541) of filing of demurrer to verified application and alternative writ of mandate.
5. Demurrer to verified application and writ of mandate.
6. Order Book entry (O. B. 44, p. 632) showing ruling on demurrer and defendant's exception.

39 7. Order Book Entry (O. B. 45, p. 111) showing filing of return to alternative writ and answer to application and demurrer thereto.

8. Return to alternative writ and answer to verified application filed, February 6, 1905.
9. Order Book Entry (O. B. 45, p. 180) showing ruling on demurrer to return and answer and defendant's exception to the ruling and refusal to answer further and final judgment and decree, defendant's motion to modify the judgment, overruling of same, defendant's exception to this ruling and defendant's bill of exceptions embracing this motion, ruling and exception, defendant's prayer for appeal, order granting the appeal and fixing amount of appeal bond and approving sureties. Complete entry found on said page 180.
10. Order Book Entry (O. B. 45, p. 210) showing filing of appeal bond.
11. Clerk's certificate to transcript.

SAMUEL PARKER,
Attorney for Defendant.

Dated May 13, 1905.

40 *Certificate of Clerk.*

STATE OF INDIANA, *County of St. Joseph, ss:*

I, George H. Alward, Clerk of the St. Joseph Circuit Court within and for said county and State, do hereby certify that the above and foregoing transcript contains full, true and correct copies of all papers and entries in said cause required by the above and foregoing præcipe.

Witness my hand and the seal of said court, at South Bend, this 22nd day of May, 1905.

[SEAL.] GEORGE H. ALWARD, *Clerk.*

June 10, 1905. Received of Terre Haute & Logansport Railway Company Fourteen and no/100 Dollars in full for transcript.

GEO. H. ALWARD, *Clerk.*

41 THE STATE OF INDIANA:

In the Supreme Court.

VANDALIA RAILROAD COMPANY, Appellant,

vs.

THE STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND.

(Filed June 13, 1905. R. A. Brown, Clerk.)

Assignment of Errors.

The appellant, Vandalia Railroad Company, now shows that it is a railroad corporation organized under the laws of the State of Indiana, created by the consolidation, under the laws of said State, of The Terre Haute & Indianapolis Railroad Company, The Logansport & Toledo Railway Company, The Indianapolis & Vincennes Railroad Company, and The Terre Haute & Logansport Railway Company, each and all railroad corporations duly created and organized under the laws of the State of Indiana, and The Saint Louis, Vandalia & Terre Haute Railroad Company, a railroad corporation duly created and organized under a special charter granted by the State of Illinois; that the said The Terre Haute & Logansport Railway Company was the defendant in the Saint Joseph Circuit Court in the action wherein judgment was rendered from which this appeal is prosecuted and the proceedings in said action were had and the said judgment was rendered against it; that, by virtue of said consolidation, this appellant, Vandalia Railroad Company, has succeeded to all property, rights, titles, duties, and interests of the said The Terre Haute & Logansport Railway Company in and to the subject matter of said proceedings and judgment.

And the said appellant, Vandalia Railroad Company, thereupon says that there is manifest error in the judgment and pro-

42 ceedings in said cause, in this, to-wit:

1. The Court erred in overruling the demurrer of the Terre Haute & Logansport Railway Company to the Verified Complaint and Application for Alternative Writ of Mandate.

2. The Court erred in overruling the demurrer of the Terre Haute & Logansport Railway Company to the Alternative Writ of Mandate issued in said cause.

3. The Court erred in sustaining the appellee's demurrer to the Return of the Terre Haute & Logansport Railway Company to the Alternative Writ of Mandate issued in said cause.

4. The Court erred in overruling the motion of the Terre Haute & Logansport Railway Company to modify the judgment rendered in said cause.

Wherefore the appellant prays that the judgment of the lower Court against the Terre Haute & Logansport Railway Company be in all things reversed.

JOHN G. WILLIAMS,
SAMUEL PARKER,
ANDERSON, DU SHANE & CRABILL,
Attorneys for Appellant.

43 And afterwards, to-wit: on the 13th day of July, 1905, the same being the 47th Judicial Day of the May Term 1905 of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by their counsel, and this cause is submitted to the Court for judgment and decree, as provided by the Act of the General Assembly of the State of Indiana, approved April 13, 1885, and the Rules of said Supreme Court adopted in relation thereto.

And afterwards, to-wit: On September 5, 1905, comes the appellant, by counsel, and files its petition for additional time to file brief herein.

And the Court being fully advised in the premises, grants appellant's petition for additional time herein, and thirty days are given.

And afterwards, to-wit: On October 5, 1905, comes the appellant, by counsel, and files eight copies of its brief herein.

And afterwards, to-wit: On November 8, 1905, comes the appellee, by counsel, and files its petition for additional time to file brief herein.

And the Court being fully advised in the premises, grants appellee's petition for additional time herein, and the same is extended to December 15, 1905.

And afterwards, to-wit: On December 14, 1905, comes the appellee, by counsel, and files eight copies of its brief herein.

44 And afterwards, to-wit: On February 23, 1905, the same being the 77th Judicial Day of the November Term 1905 of said Court, come the parties by counsel, and the Court being advised in the premises, affirms the judgment of the court below, with the following opinion pronounced by Montgomery, J., which said opinion is in the words and figures following:

45 R.

THE STATE OF INDIANA:

In the Supreme Court, November Term, 1905, on the 23rd Day of February, 1906, Being the 77th Judicial Day of said November Term, 1905.

Hon. John H. Gillett, Chief Justice.
Hon. James H. Jordan, Hon. Oscar H. Montgomery, Hon. John V. Hadley, Hon. Leander J. Monks, Justices.

No. 20663.

In the case of

VANDALIA RAILROAD COMPANY
vs.
STATE OF INDIANA *ex Rel.* CITY OF SOUTH BEND.

Appeal from the St. Joseph Circuit Court.

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises gives its opinion and judgment as follows, pronounced by Montgomery, J.

46 Appellee brought this action against the Terre Haute & Logansport Railway Company for a writ of mandamus to compel said company to open, plank and make safe and convenient for travel, the crossing of Calvert street over its right of way, tracks and yard, in the City of South Bend.

An alternative writ was issued, whereupon the defendant appeared, waived service and filed its demurrer for want of facts, to the application, the alternative writ and to the petition and writ. This demurrer was overruled and a return filed to which appellee successfully demurred, and, defendant declining to plead further, judgment was rendered in favor of appellee as prayed.

Appellant alleges that by consolidation it has succeeded to the rights of the Terra Haute & Logansport Ry. Co., and by proper assignments of error presents for review the action of the court in overruling the demurrer to the alternative writ, and in sustaining appellee's demurrer to the return.

The alternative writ set forth the following among other facts:—That the City of South Bend is a municipal corporation of this State; the Terre Haute and Logansport Railway Company is a railroad corporation operating a line of railway from Bronson street in said city to the south corporation line; that on the 10th day of November 1884, said city by ordinance, a copy of which is filed with the complaint, granted to said railway company a franchise to operate its said road across the streets and alleys of the city; that said railway company accepted said franchise, and ever since has acted under the same; that the express condition of said franchise was that wherever a street or alley of said city was crossed by said railroad it should be made to conform with the grade of such street or alley as then fixed or thereafter established, and so maintained by

said company as to cause the least obstruction possible to the passage of persons and vehicles; that said railroad intersects Calvert street formerly known as Elmira street, a public highway of said city, and in use as such by the public, at a point particularly described; that said street is 60 feet wide, and the grade thereof has been established for more than four years, but said company has not opened its real property, right of way or tracks at the point of intersection or made the same conform to the grade of said street, but has refused and still refuses so to do; that on the 18th day of December 1903, said
47 city notified said railway company to open up said intersection, and to plank the same, but said company refused and neglected so to do.

It was provided by section four of the franchise ordinance that if after notice the railroad company failed to do the things required of it by the ordinance the same might be done by the street commissioner of the city, and the cost thereof with twenty per cent. penalty recovered of the company in any court of competent jurisdiction.

Appellant argues that the passage of the franchise ordinance by the city, and its acceptance by the railway company constituted a contract; that this action is founded upon such contract, and that duties of a corporation arising wholly out of contract relations will not be enforced by writs of mandamus.

It is well settled that the use of writs of mandamus is limited to the enforcement of obligations imposed by law; and duties of a corporation arising wholly out of contract obligations, and not imposed by express law, or by the conditions of its charter will not be enforced by such writs. State, *ex rel. v.* Trustees, etc., *et al.*, 114 Ind. 389; Indiana, etc. Ry. Co. *v.* Rinehart, 14 Ind. App. 588; 19 Am. & Eng. Ency. Law 742.

The general railroad act of this State grants to a railroad company power, "to construct its road upon or across any * * * highway * * * so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner so as to afford security for life and property; but the corporation shall restore the * * * highway * * * thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness." § 5153 clause 5, Burns 1901.

It has been frequently held that under this statute a railroad company is required to make safe and convenient crossings at the intersections of all highways, whether the same were established and opened before or after the construction of the railroad. Louisville, etc. Ry. Co. *v.* Smith, 91 Ind. 119; Lake Erie etc. R. Co. *v.* Cluggish, *et al.* 143 Ind. 347; 351; Evansville, etc. R. Co. *v.* State, *ex rel.*, 149 Ind. 276, 278; Egbert *v.* Lake Shore etc. Ry. Co., 6 Ind. App. 350, 353; Baltimore etc. R. Co. *v.* State, *ex rel.* 159 Ind. 510, 519; Lake Erie, etc. R. Co. *v.* Shelly, 163 Ind. 36, 41; Elliott on Railroads, § 1102.

Section 5172*a* Burns 1901, Acts 1895 p. 233 is as follows: "That it shall be the duty of each railroad company whose road or
48 tracks cross, or shall hereafter cross, any street, avenue or alley, in any incorporated town or city in the State of Indiana

which said street, avenue or alley has been, or shall hereafter be, by addition, plat or otherwise, dedicated to the public use, to properly grade and plank or gravel its said road and tracks at its intersection with and crossing of said street, avenue or alley in accordance with the grade of said street or avenue, in such manner as to afford security for life and property at said intersection and crossing."

It is thus seen that the duty which appellee seeks to have performed by this proceeding, is one specifically enjoined by law and imposed by appellant's charter. The performance of a similar duty has been enforced in numerous instances by proceedings of this character. Indianapolis etc. R. Co. *v.* State *ex rel.*, 37 Ind. 489; Evansville, etc. R. Co. *v.* State, *ex rel.*, 149 Ind. 276; Chicago, etc. R. Co. *v.* State, *ex rel.*, 158 Ind. 189; Chicago, etc. R. Co. *v.* State, *ex rel.*, 159 Ind. 237; Baltimore, etc. R. Co. *v.* State, *ex rel.*, 159 Ind. 510.

The provisions of the franchise ordinance requiring the railway company to make and maintain safe crossings were simply declaratory of the law as it existed independently of the city's enactment, and it cannot be fairly said the omitted duty complained of was one growing wholly out of contract obligations. In granting a franchise to use its streets, alleys, or public places, the city exercises its delegated legislative powers, and for that purpose could not by contract barter away its future legislative control over such highways and places. It is the plain and continuing duty of a city to prevent the unnecessary obstruction of its streets, and to see that the same are kept in good order and safe for use by the public. The railway company, a quasi-public corporation, is created to facilitate and not to impede travel, and from its nature as well as charter obligations the duty arises of keeping its intersections with highways in good repair and condition for safe and convenient use by the public. In the case of Indianapolis etc. R. Co. *v.* City of Lawrenceburg, 37 Ind. 489, 495, this court disposed of a contention like that now made, in the following language:—"But this ordinance is not a contract between the railroad company and the city, but simply a grant of the right of way upon certain conditions and duties subsequent to be performed by the company. And the proper means by which a
corporation may be compelled to perform a plain duty—and
49 the duty is plain in this case—is by a writ of mandate."
Chicago etc. Ry. Co. *v.* State, *ex rel.*, 158 Ind. 189, 192. See, also Seymour Water Company *v.* City of Seymour, 163 Ind. 120, 130 and cases cited.

It is next urged that the relator could have constructed the crossing and brought an action for the cost of the same and the penalty as provided in the ordinance, and thereby have secured complete and adequate redress without resort to this extraordinary remedy. It is undeniable that either under the provisions of the ordinance or of §5172*a* Burns 1901, the city might have pursued the course suggested, but the query remains whether such a remedy must be held adequate, and exclusive. This question has been answered in the negative in the case of Indianapolis etc. R. Co. *v.* State, *ex rel.*, 37 Ind. 489, 494, the court saying: "Can it be said, then, that this would be an adequate remedy? It would seem to us not. Or shall

t be said that it was the duty of the city to fill up and grade the streets and alleys so as to make them convenient for passage, etc., at her own expense in the first instance, and then to be compelled to bring an action against the railroad company for reimbursement? If one have a right of action for a grievance against another, either for damages or for the specific performance of an act, it is certainly not an adequate remedy to him, to be compelled in the first instance to lay out one hundred dollars for the use of another, and then to have the right simply to recover back his money so laid out by him, and perhaps get legal interest on his money."

The fact that in addition to the cost, a specific penalty may be recovered in lieu of legal interest does not affect the principle. It would further seem to be more expedient and conducive to safety that such work as elevating or lowering railway tracks and constructing crossings should be done by skilled workmen acting under orders from the company concerned, rather than by the unexperienced employés of the municipality. Our conclusion is that mandamus was an available remedy to enforce performance of this duty, notwithstanding the provisions for a different procedure. State *v.* New York, etc. R. Co. 71 Conn. 43; State, *ex rel. v.* Minnesota T. Ry. Co. 80 Minn. 108.

It is further insisted that the choice of materials to be used in making the crossing should have been left to the company, and that the provisions of the mandate requiring the company "to plank the crossing" were not justified by the terms of the ordinance or by the facts stated in the writ. The ordinance does not purport to specify the materials required to make the crossing most convenient for use. The statute requires the railroad "to properly grade and plank or gravel its said road and tracks at its intersections." Conceding that in the first instance the company had an option as to materials to be used, providing the crossing was put in such condition "as to afford security to life and property," it does not follow that after failure and refusal to construct any crossing, it may justly complain of a choice of materials made by the court. Appellee's petition asked for a plank crossing, the statute authorized the court to prescribe that material, and upon the facts and circumstances shown the court was warranted in requiring the crossing to be planked. The writ was not subject to the criticism of being too specific, but properly directed particularly what should be done in the construction of the crossing. Elliot on Railroads, §1106; Chicago etc. R. Co. *v.* State *ex rel.*, 158 Ind. 189, 194, and cases cited.

The demurrer to the alternative writ was rightly overruled.

The return of the defendant below contained in substance the following averments:—That the Terre Haute and Logansport Railway Company is a corporation owning and operating a line of railroad from Terre Haute to Bronson street in the City of South Bend; that on Dec. 1st, 1893, the Terre Haute & Logansport Railway Company, to whom the original franchise was granted ceased to own said railroad; that on Oct. 28th, 1903, defendant was served with notice from the Board of Public Works of the City of South Bend to

open Calvert street, formerly called Elmira street, across its tracks, and to plank the crossing in the usual manner, and that it failed and refused to do said work because of the following facts:—that at the time of the passage of said franchise ordinance the place where Calvert or Elmira street crosses said railroad tracks was outside the corporate limits of said city, and in 1887 was taken into the corporate limits of the town of Myler, and in 1892 said town was annexed and became a part of said city; that on Aug. 12th, 1891, Frank S. Stover and thirteen others filed with the board of trustees of said town, a petition for the establishment of a street to be known as Elmira street over the ground where the relator now claims said street is located. The special proceedings had in connection with the establishment of said street are set out in detail, tending to show
51 that the Terre Haute & Logansport Railroad Company was not legally notified of such proceedings; it is shown that prior thereto said company had executed an outstanding deed of trust on its property, and that the trustee therein named was not notified of said proceedings; and subsequently said deed of trust was foreclosed, and upon sale said property was duly transferred to the defendant Terre Haute & Logansport Railroad Company.

It is further charged that in the year 1901 the relator was claiming that by virtue of the proceedings of the Board of Trustees of the town of Myler, said Calvert or Elmira street was located and established across the right of way, land, tracks and yard of the Terre Haute & Logansport Railroad Company which, because of the special facts pleaded, said company in good faith denied; that on January 17th, 1902, for the purpose of adjusting and settling said conflicting claims, the relator acting by its Board of Public Works, entered into a contract whereby said railway company agreed to construct a steel viaduct over its tracks at said alleged street, and the relator agreed to construct the approaches thereto, and each to perform other agreements therein set out, which contract was in writing and was by ordinance duly ratified by the Common Council of said city; the viaduct agreement and ratifying ordinance are set out in full as part of the return.

The agreement provided that in lieu of a grade crossing, the railway company should construct a steel viaduct above and across its tracks at Elmira street with a paved roadway thirty feet wide and sidewalk on each side eight feet wide, the bottom of the same to be twenty two feet above the top of the rail,—such work to be done when the city shall have money in hand sufficient to build the approaches to said viaduct, and through its Board of Public Works and Common Council shall have ordered the approaches built, appropriated the necessary funds, and notified the railway company thereof, in writing; and when completed the city should "maintain and keep in repair said approaches and said viaduct for all time."

It is further alleged that the construction of said viaduct would cost $30,000.00, and that the railway company is now and at all times has been able, ready and willing to perform all its agreements in said contract contained, but that the relator has performed none

of its agreements and given said company no notice to con-
52 struct said viaduct, and that the public had acquired no right to use the alleged street across its yard and tracks except in the manner set out and by the special proceedings of the Board of Trustees of the Town of Myler, which it is charged were wholly insufficient.

Wherefore defendant says it ought not be compelled to open the alleged street across its tracks and yard at grade.

Appellant's counsel assert and argue an insufficiency of the notice and return of service in the special proceedings of the Board of Trustees of the Town of Myler for the establishment of Elmira street; a want of notice to the mortgagee of the property to be appropriated; and, in consequence, a taking of property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

Appellee's counsel insist that the only question presentdd to and considered by the circuit court upon the demurrer to the return was the validity of the agreement therein pleaded.

Appeals are provided primarily to enable parties to secure a review of the decisions made by trial courts, and generally speaking, upon appeal parties will be held to the position and theory assumed and maintained by them in the court below. In the preparation of issues for trial it is necessary to require parties to adopt and make their pleadings conform to some definite theory. When a pleading has been framed upon a manifestly definite theory, it must be good upon that theory or it will not be good at all. A pleading must be judged from its general tenor and scope, and when it assumes to proceed upon a distinct theory it cannot be made good on some other by casting into it isolated statements, which if fully pleaded in separate paragraphs might constitute a cause of action or defence. Western Union Teleg. Co. *v.* Young, 93 Ind. 118; Western Union etc. Co. *v.* Reed, 96 Ind. 195, 198; Balue *v.* Taylor *et al.*, 136 Ind. 368; 21 Ency. Plead. & Prac. 652.

The manifest theory of the pleader was to show that a reasonable and *bona fide* controversy existed as to the validity of the proceedings for the establishment of Elmira Street by the Board of Trustees of the Town of Myler, as an inducement to and consideration for entering into the compromise agreement pleaded, and that said contract having been legally executed and not rescinded, the Rail-
way Company was thereby absolved from the duty declared
53 upon, to construct and maintain a grade crossing at the point in controversy. "A single paragraph of answer cannot perform the double function of denying the cause of action, and confessing and avoiding it. It must be one thing or the other, but it cannot be both; and its character, in this respect, must be determined from the general scope of its averments." Kimble *v.* Christie, 55 Ind. 140, 144. In our opinion the return under consideration was intended to confess and avoid the duty sought to be enforced, and its sufficiency must be determined upon that theory. This conclusion forbids a discussion of the legality of the various steps taken

in the proceedings to establish Elmira street, as well as the constitutional question raised.

The only question remaining for decision is the validity of the contract made between the Railway Company and the city, for the construction and maintenance of a viaduct. The charter of the City of South Bend authorized its Board of Public Works to "design, order, contract for and execute the erection of any culvert, bridge, way, viaduct, tunnel or acqueduct within such city, or to enter into a contract with any company or individual for the joint erection and maintenance by such company or individual and such city of any such structure * * * , provided that such contract shall in all cases be submitted by said board to the council of such city and approved by them by ordinance before the same shall take effect." Act 1901, p. 235, § 4190*n*8, Burns 1901.

It is appropriate to note that the necessity, if any, for the viaduct provided for by the agreement pleaded was created by the existence and operation of the railroad. If the street was lawfully established across the tracks and ground of the railway company, a fact not denied by the return as we construe it, then the duty of making and maintaining a safe and convenient grade crossing devolved upon the company; and in such case the Board of Works would not be justified in either erecting or maintaining a viaduct solely at the city's expense. The authority, if any existed, for entering into the contract must be found in that part of the statute which empowered the Board with the approval of the Council, to make a contract with any company for the joint erection and maintenance of such a structure. The power of the city to make this contract is in no wise affected by the circumstance that the agreement was the result of a compromise and settlement of an existing controversy. It is made to appear that the work contemplated has not been performed, and so far as disclosed no rights have attached by virtue of the
54 agreement. The viaduct as planned was to be forty six feet wide, being fourteen feet less than the width of the street, and was to be maintained solely by the city "for all time."

Municipal corporations of this state are given exclusive control over their streets and alleys. This authority is conferred for the benefit of the public, and from it arises a continuing duty on the part of the city to exercise legislative control over its streets and alleys at all times and places when demanded by the public good. A municipal corporation has no power by contract, ordinance or by-law to cede away, limit or control its legislative or governmental powers, or to disable itself from performing its public duties. 1 Dillon Municipal Cor. §97; Elliott on Roads and Streets §657; Schipper *v.* City of Aurora, 121 Ind. 154, 159; City of Peru *v.* Gleason, 91 Ind. 566; City of Indianapolis *v.* Indianapolis Gas Co. 66 Ind. 396.

If the contract relied upon by appellant is valid its obligations are secure against impairment, not only by the City of South Bend, but also by the Legislature itself; and the viaduct, once constructed, must be maintained by the city to the end of time, and the company and its successors be forever relieved of all duties now owing or hereafter to be imposed on account of the grade crossing. It is

not at all improbable that the future policy of the state, and the safety and convenience of the people, may require the elevation or lowering of railroad tracks through cities and populous districts, and the preservation of ordinary highways upon natural grades free from obstructions. It is impossible to anticipate the changes which in the future may be found expedient, and the police regulations which may become necessary, to be made, at this particular crossing. The viaduct contract in question provides for single maintenance by the city, instead of joint maintenance by both the parties, and it purports to bind the city and to limit and deny its legislative and police control over this part of the street, for all time. That these provisions of the agreement are unauthorized and invalid is not only approved by reason and sound policy, but well supported by authority.

In the case of State *ex rel. v.* Minnesota T. Ry. Co., 80 Minn. 108, 116, the Supreme Court of Minnesota in holding a very similar contract void, said: "It cannot be that the Common Council of 1888, by the passage of a resolution providing for the construction of a bridge sixty feet in width in a street one hundred and twenty feet wide, to be perpetually maintained by the city, could limit or control the legislative action of its successors, or could abdicate its right, as future necessity should require, to compel the construction and maintenance of a bridge or viaduct of such dimensions, width, and construction as should, as nearly as may be, restore the street to its former condition of usefulness."

In the case of Gale *v.* Village of Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80, in discussing a kindred contract, Cooley, J. said:—"What would be thought proper for the village this year might be found worse than useless the next and no official prescience could determine with absolute or even tolerable certainty what changes a few years might work. Indeed it is impossible to predicate reasonableness to any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors." See also: New York, N. H. & H. R. Co. *v.* Village of New Rochelle, 60 N. Y. Supp. 904; Brimmer *v.* City of Boston, 102 Mass. 19; Milhan *et al. v.* Sharp, *et al.*, 27 N. Y. 611; City of Oakland *v.* Carpentier, 13 Cal. 540; Mott, *et al. v.* Penn. R. R. Co. *et al.*, 30 Pa. St. 1; Mayor, etc. *v.* Bowman, 39 Miss. 671; Dingman *v.* People, 51 Ill. 277; Mathews *v.* City of Alexandria, 68 Mo. 115.

The agreement entered into between the relator and the railway company was on the part of the city an unwarranted surrender of legislative power and control over the crossing, and an unauthorized assumption of the burdens of another, and is invalid and void. We have already shown that the specific duty of making and maintaining a grade crossing was imposed upon the railway company, and the agreement relied upon, to provide a viaduct in lieu of the

crossing, being invalid, it follows that the return was insufficient and the demurrer thereto rightly sustained.

Finding no reversible error, the *Judgment is Affirmed.*

56 It is therefore considered by the Court that the judgment of the court below in the above entitled cause be in all things affirmed at the cost of the appellant.

And it is further considered and adjudged by the Court that the appellee recover of the appellant the sum of $— for its costs and charges in this behalf expended.

57 In the Supreme Court of the State of Indiana.

VANDALIA RAILROAD COMPANY, Appellant,
vs.
THE STATE OF INDIANA *ex Rel.* THE CITY OF SOUTH BEND, Appellee.

Petition for Writ of Error.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned, Vandalia Railroad Company, petitioning shows that on February 23rd 1906, the Supreme Court of the State of Indiana, being the highest court of law and equity in that State, rendered its judgment in the above entitled cause against this petitioner; that the effect of said judgment was and is to greatly injure this petitioner in that, if permitted to stand as rendered, the same will deprive the petitioner of certain of its property without due process of law and without compensation, in violation of the

58 Fourteenth Amendment to the Constitution of the United States, as specifically set forth in the transcript of the record of said cause in said Supreme Court of the State of Indiana, beginning with line 14 page 18, which said transcript is herewith submitted.

In addition to said Transcript of the Record of the Supreme Court of the State of Indiana and this Petition, the petitioner submits and presents its Bond in the sum of $5,000. executed by itself and American Surety Company and payable to the said defendant in error, and its assignment of error, and it now prays that it be granted a writ of error to said Supreme Court of the State of Indiana in said cause, and that said Bond be approved and made a supersaede-s and that a citation issue for the defendant in error as required by law and that it may have such other orders as it may be entitled to in the premises.

VANDALIA RAILROAD COMPANY,
Petitioner,
By JOHN G. WILLIAMS &
SAMUEL PARKER, *Its Attorneys.*

[Endorsed:] Filed Apr. 27, 1906. R. A. Brown, clerk.

59 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Indiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Vandalia Railroad Company, appellant, and The State of Indiana *ex rel.* The City of South Bend, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;
60 or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of April, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Filed Apr. 27, 1906. R. A. Brown, clerk.

61 Supreme Court of the State of Indiana.

VANDALIA RAILROAD COMPANY, Appellant,
vs.
THE STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND, Appellee.

Bond on Writ of Error.

Know all men by these presents, That we, Vandalia Railroad Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the State of Indiana on the relation of the City of South Bend, defendant in error, in the full and just sum of Five Thousand Dollars ($5,000.00), to be paid to the said State of Indiana, on the relation of the City of South Bend, or assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of April, in the year of our Lord, One Thousand Nine Hundred and Six.

Whereas, lately at a term of the Supreme Court of the State of Indiana, in a suit pending in said court between Vandalia Railroad Company, as appellant, and the State of Indiana, on the relation of the City of South Bend, a judgment was rendered against the said Vandalia Railroad Company, and the said company having obtained
a writ of error and filed the same in the Clerk's office of the
62 said court to reverse the judgment in the aforesaid suit, and
a citation directed to the said defendant in error, citing and admonishing it to be, and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Vandalia Railroad Company shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

VANDALIA RAILROAD COMPANY,
By JAMES McCREA, *President.*
AMERICAN SURETY COMPANY OF NEW YORK.
F. M. HAYES, *Resident Vice-President.*
Attest: J. KENT HALLOCK,
Resident Assistant Secretary.

Attest:
S. H. CHURCH,
Assistant Secretary.

STATE OF PENNSYLVANIA, *County of Allegheny, ss:*

Before me, J. M. McKibben, a Notary Public, in and for said County and State, personally came James McCrea, President, and S. H. Church, Assistant Secretary of the Vandalia Railroad Com-

pany, who severally acknowledged the execution and signing of the foregoing document to be their voluntary act and deed, and the voluntary act and deed of said Vandalia Railroad Company.

Witness my hand and seal this 17th day of April, 1906.

J. M. McKIBBEN,
Notary Public.

[SEAL.]

My commission expires Jan. 19, 1907.

63 STATE OF PENNA., *County of Allegheny, ss:*

Before me, W. S. Thomas, a Notary Public, in and for said County and State, personally came F. M. Hayes Resident Vice President and J. Kent Hallock, Resident Assistant Secretary of American Surety Company of New York, who severally acknowledged the execution and signing of the foregoing document to be their voluntary act and deed and the voluntary act and deed of said American Surety Company of New York.

Witness my hand and seal this 17th day of April, 1906.

W. S. THOMAS, [SEAL.]
Notary Public.

My commission expires Jan. 19, 1907.

Approved, to operate as a supersedeas.
April 18, 1906.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

64 UNITED STATES OF AMERICA, *ss:*

To the State of Indiana *ex rel.* The City of South Bend, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Indiana wherein Vandalia Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this 18th day of April, in the year of our Lord one thousand nine hundred and six.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

65 The undersigned, the attorneys of record for the within named defendant in error, The State of Indiana on the relation of the City of South Bend, do now and hereby accept service of the within citation which is signed by William R. Day, Associate

Justice of the Supreme Court of the United States, and dated April 18, 1906, and we hereby acknowledge the receipt of a copy of said citation this 21st day of April, 1906.

FRANK H. DUNNAHOO,
HARRY R. WAIR,
Attorney- for Defendant in Error in the Supreme Court of the State of Indiana and in the Supreme Court of the United States.

Witness:
EDA E. ROSENCRANS.

Filed Apr. 27, 1906.

R. A. BROWN, *Clerk.*

66 Supreme Court of Indiana.

VANDALIA RAILROAD COMPANY, Appellant,
vs.
THE STATE OF INDIANA on the Relation of THE CITY OF SOUTH BEND, Appellee.

Assignment of Errors.

Vandalia Railroad Company, on the Writ of Error from the Supreme Court of the United States, assigns error as follows:

1. That the Supreme Court of Indiana erred—

a. In sustaining the demurrer of the plaintiff, The State of Indiana on the relation of the City of South Bend, to the return of the defendant, The Terre Haute & Logansport Railway Company, to the alternative Writ of Mandate issued in said cause, in so far as said return is based upon the Constitution of the United States and the rights of said defendant secured thereby.

b. In rendering the judgment in said cause whereby it affirmed the ruling of the Saint Joseph Circuit Court of Saint Joseph County, Indiana, in sustaining the demurrer of said The State of Indiana on the relation of the City of South Bend, to the return of the defendant, The Terre Haute & Logansport Railway Company, to the alternative writ of mandate issued in said cause, in disregard of the rights of said defendant and of this appellant, Vandalia Railroad Company, its successor, guaranteed by the Fourteenth Amendment to the Constitution of the United States, and specially averred and set up in said return.

2. That the judgment and proceedings in this cause deprive this appellant, Vandalia Railroad Company, of its property without due process of law, and deny to it the equal protection of the laws in contravention of the Constitution of the United States.

Said Company therefore prays that the judgment of the Supreme Court of Indiana may be reversed.

JNO. G. WILLIAMS,
SAMUEL PARKER,
Counsel for Vandalia Railroad Company.

67 [Endorsed:] Vandalia Railroad Company, Appellant, *vs.* The State of Indiana *ex rel.* City of South Bend. Assignment of Errors. Filed Apr. 27, 1906. R. A. Brown, clerk.

68 STATE OF INDIANA:

In the Supreme Court.

I Robert A. Brown, Clerk of the Supreme Court of the State of Indiana, hereby certify the above and foregoing to be a full, true, and complete transcript of the record of the proceedings had, papers filed, except briefs, motions decided, rulings made, opinions delivered, and judgments rendered in the said Supreme Court of Indiana, in the cause entitled The Vandalia Railroad Company, Appellant against State of Indiana on the relation of the City of South Bend, Appellee, and numbered 20,663, as appears from the records and original papers on file in my office. I further certify that the writ of error inserted in said transcript is the original writ of error issued by the Supreme Court of the United States and filed in said cause. A copy of the bond and the original citation and assignment of errors are also inserted herein.

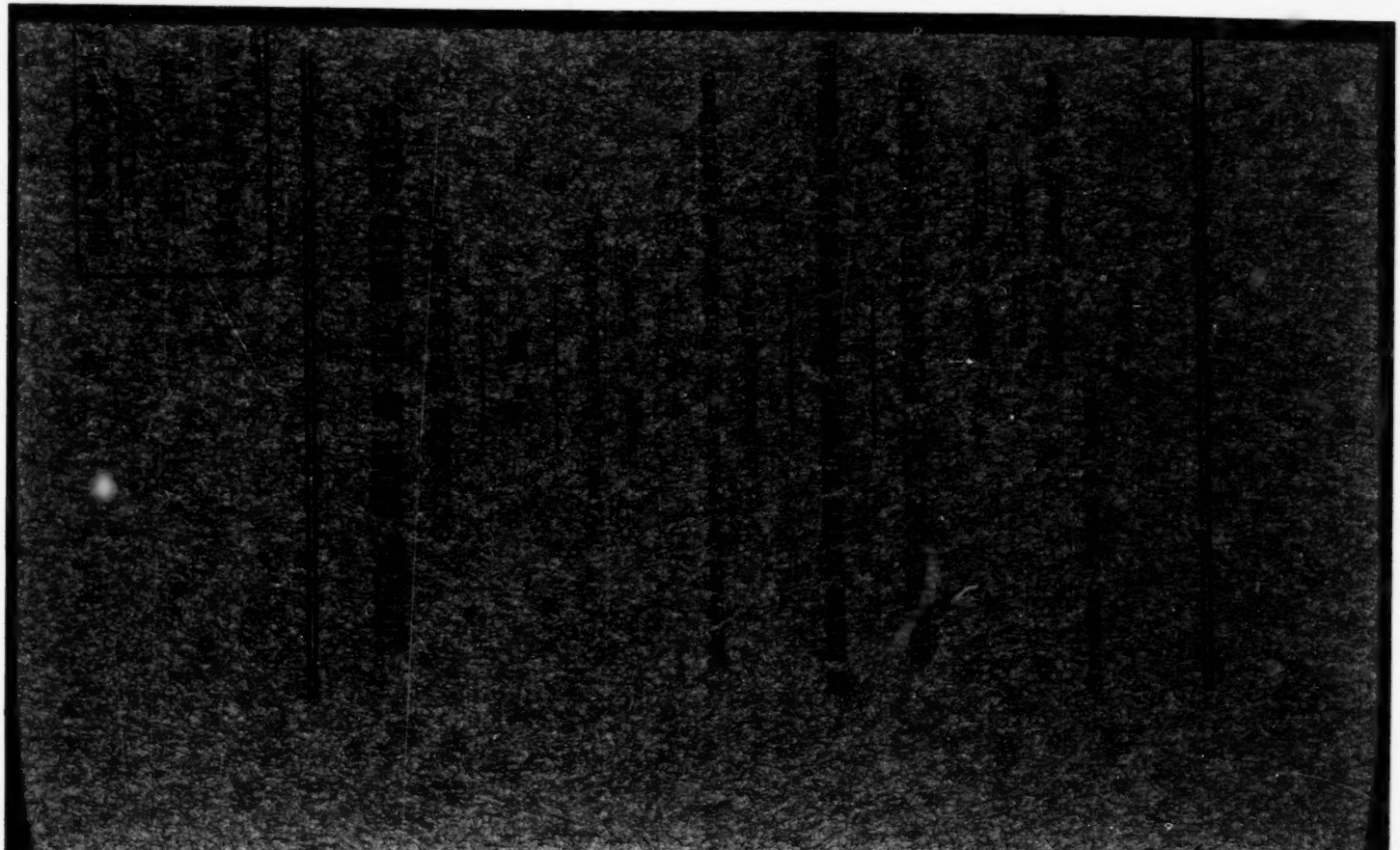
In witness whereof, I hereunto set my hand and affix the seal of said Supreme Court at the City of Indianapolis, Indiana, this 30th day of April, 1906.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROB'T A. BROWN,
Clerk Supreme Court of Indiana.

69 [Endorsed:] In the Supreme Court of the United States. Vandalia Railroad Company Pl'ff in Error *vs.* State of Indiana *ex rel.* City of South Bend Def't in Error.

Endorsed on cover: File No. 20,239, Indiana supreme court. Term No. 282. Vandalia Railroad Company, plaintiff in error, *vs.* The State of Indiana *ex rel.* The City of South Bend. Filed May 2d, 1906. File No. 20,239.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 26.

VANDALIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA ex rel. THE CITY OF SOUTH BEND,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF STATE OF INDIANA

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is here upon a writ of error to the Supreme Court of the State of Indiana, sued out by the plaintiff in error, to secure a review of the judgment of that court affirming a judgment to the Saint Joseph Circuit Court of Saint Joseph County, Indiana, in an action brought by the defendant in error against the plaintiff in error in the last named court.

The history of the action is as follows: On May 2, 1904, the defendant in error filed its verified complaint in the Saint Joseph Circuit Court against the Terre Haute and Logansport

Railway Company (Rec. 3), wherein it was alleged, in substance, that the relator, the City of South Bend, was a municipal corporation organized under the laws of the State of Indiana and that the defendant, The Terre Haute and Logansport Railway Company, was a corporation operating a line of railway from Bronson Street, in said city, to the South limit thereof; that on November 10, 1904, the defendant was granted a franchise by said city, which was accepted by it, and under which it was given the right to cross the streets and alleys in the city and to operate its railroad over the same, but upon the condition that whenever the railroad crossed any street or alley it should be made to conform to the grade of such street or alley as the same was then or as might thereafter be established. and that the railroad should be so constructed and maintained as to cause the least possible obstruction to the passage of persons and vehicles; that there was, and for more than four years had been, a public street, with an established grade, running East and West in said city, and intersecting the right-of-way and tracks of the defendant, and known as Calvert Street, which street had never been opened across the right-of-way and tracks, and that the defendant, though notified so to do, had not opened, but had refused to open its right-of-way and tracks at the place of their intersection with said street, and to make its road bed conform to the grade of the street and to plank the crossing and to make the same safe and convenient for the passage of persons and vehicles.

A copy of the franchise ordinance referred to in the complaint was attached thereto and made a part therof (Rec. 5), and the place of intersection of Calvert Street and the right-of-way was particularly described (Rec. 4). There was a misstatement of fact in the complaint in this, that it was alleged therein that the franchise was granted to the defendant, The Terre Haute and Logansport Railway Company, whereas it was granted to its immediate predecessor, The Terre Haute and Logansport Railroad Company.

Upon the filing of this complaint the court heard the same, and, on motion, ordered that an alternative writ issue commanding the defendant to open up its right-of-way and tracks and yards within the described street intersection, and to make its roadbed and railway tracks at the intersection conform to the established grade of the street, and to plank and make the crossing safe and convenient for persons and vehicles, and, in default of so doing, that it appear in court at a time named and show cause why the same should not be done (Rec. 7).

At the time named in the alternative writ the defendant appeared and filed its demurrer to the complaint and to the alternative writ (Rec. 9), which on a later day the court overruled (Rec. 10), when the defendant filed its answer in three paragraphs. Later still, upon leave of court, the defendant withdrew its three paragraphs of answer and filed its return to the alternative writ of mandate in one paragraph (Rec. 11). The plaintiff filed its demurrer to this return (Rec. 17), which was sustained by the court (Rec. 18). The defendant excepted to this ruling of the court and refused to plead further, whereupon the court rendered its judgment that a peremptory writ of mandate issue commanding the defendant to open up its tracks and yards within the street intersection and to make the railroad tracks conform to the established grade of the street, and to plank the crossing and make the same safe and convenient for the passage of persons and vehicles (Rec. 18).

From this judgment the defendant, The Terre Haute and Logansport Railway Company, prayed an appeal to the Supreme Court of the State (Rec. 20), which was granted upon its filing an appeal bond in a penal sum then fixed and with a surety then approved by the court. The bond was filed by the defendant as required (Rec. 21) and a term time appeal perfected. The transcript of the record and an assignment of errors thereon were filed in the office of the Clerk of the Supreme Court on June 13, 1905. In the Supreme Court the plaintiff in error here, Vandalia Railway Company, was the appellant, and the assignment of errors was made by that company for the rea-

son that, as shown by the assignment of errors, while the action was pending in the lower court, the defendant, The Terre Haute & Logansport Railway Company, and certain other companies, were consolidated and formed into a railroad corporation, under the name of Vandalia Railroad Company, which company, by the consolidation, succeeded to all the rights and duties of The Terre Haute & Logansport Railway Company (Rec. 24).

The only specification in the Assignment of Errors in the State Supreme Court that is involved here is the third, which reads: "The court erred in sustaining the appellee's demurrer to the return of The Terre Haute & Logansport Railway Company to the Alternative Writ of Mandate issued in said cause."

The return to the alternative writ of mandate (Rec. 11) admitted certain facts averred in the verified complaint, namely: That the City of South Bend was a municipal corporation organized under the laws of the State of Indiana, and that the defendant was a railway corporation owning and operating a line of railway from the City of Terre Haute, Indiana, to the southern limits of the City of South Bend, and to Bronson Street, in the city, and that on November 10, 1884, the Common Council of the city passed the franchise ordinance referred to in the complaint, whereby the Terre Haute & Logansport Railroad Company, its successors and assigns, were granted the right to construct, maintain and operate a railroad between the points named in said City; that the Terre Haute & Logansport Railroad Company entered said City and constructed its railroad tracks and thereafter maintained and used said tracks for railroad purposes, and that it was served with notice from the Board of Public Works of the City to open said Calvert Street, which was formerly called Elmira Street, across its yard and tracks, and to plank the crossing in the usual manner, and further that it failed and refused to make the crossing over its tracks, at their then grade, safe and convenient for persons and vehicles at the place where the City claimed the crossing to exist. And then alleged as a reason for not opening the street across its yards, right-of-way and tracks, that when said ordinance was passed and when the

railroad was constructed into the City of South Bend and to Bronson Street, the place where said Calvert Street was claimed to be was outside the limits of the City and not within the boundaries of any town or city until June 16, 1887, when certain territory, including that over which the City claimed Calvert Street laid, was incorporated as a town under the name of Myler, and continued to be a town by that name until some time in 1892, when the same was annexed to and became a part of the City of South Bend. Beginning with August 12, 1891, an attempt was made to establish a street in said Town of Myler by proceedings intended to be in accordance with the laws of the State, for the establishment of streets in towns. Among the lands described in said proceedings and attempted thereby to be appropriated for said street was land then owned by the Terre Haute & Logansport Railroad Company, and used by it for railroad purposes, which is the same land over and upon which the City claimed that said Calvert Street or Elmira Street was located and established. It was further alleged in said return that said notice, referring to the notice of the meeting of the Town Commissioners to assess the damages and benefits to land owners whose lands would be affected by said street, was not served upon the Terre Haute & Logansport Railroad Company, which then owned said land, and said railroad, and that it did not, by any officer, agent or attorney, attend said meeting of the commissioners, nor any meeting of the Board of Trustees of the Town of Myler, at which any proceedings were had in respect to the locating of said street, and did not become a party to said proceedings in any manner whatever. The return then proceeds:

"And this defendant further says that, on January 1, 1883, the said Terre Haute & Logansport Railroad Company executed its deed of trust or mortgage to Benjamin Harrison, trustee, whereby it conveyed to him its railroad then constructed and lying between Rockville, in the County of Parke, in the State of Indiana, and Logansport, in the County of Cass, in the State of Indiana, and, also, the extension of said railroad to be constructed from its then northern terminus, in the said City of Logans-

port to the said City of South Bend, in the County of St. Joseph, together with the right-of-way, roadbed and depot grounds, and all other lands, rights, franchises, and property appertaining to or connected with the said railroad and said extension, which the said Terre Haute & Logansport Railroad Company then owned or might thereafter acquire or become entitled to, to secure the payment of one million dollars, represented by one thousand one thousand dollar bonds executed by the said railroad company and payable to said Benjamin Harrison, trustee, or bearer. Said trust deed or mortgage was duly acknowledged by said railroad company before an officer authorized by law to take acknowledgments of mortgages, and was recorded in the office of the recorder of St. Joseph County, Indiana, within forty-five days from the time of its execution.

"On December 30, 1896, said railroad company, having made default in the performance of the conditions of said trust deed or mortgage, said Benjamin Harrison, trustee, commenced an action in the Circuit Court of the United States for the District of Indiana, against said The Terre Haute & Logansport Railroad Company and another for the foreclosure of said mortgage by filing therein his bill of complaint, upon which a subpoena for said railroad company was duly issued and served. Thereafter, the said Circuit Court of the United States having then and there full jurisdiction of the subject matter of the action and of the parties, found and adjudged in said cause that there was due the said Benjamin Harrison, trustee, from said railroad company on account of the bonds secured by said mortgage, the sum of $1,060,000.00, and adjudged and decreed that if said sum were not paid within a time then fixed by the Court, the mortgaged property be sold by the Master in Chancery of said Court to make said sum. The said railroad company failed to pay said sum, whereupon said Master in Chancery, William P. Fishback, after giving notice as required by the decree and orders of the Court made in said cause, sold all of said mortgaged property to Joshua Twing Brooks, at and for $1,060,000.00. The said Brooks paid the amount of his bid and designated this defendant, The Terre

Haute & Logansport Railway Company, as the party to whom said property should be conveyed. Thereupon, and on December 1, 1898, the said Master in Chancery executed his deed by which he conveyed to the defendant all of said mortgaged property ordered by said Court to be sold and sold by him to said Brooks, which included and includes the lands, rights, franchises and all other property acquired, and, at the time of the rendition of said decree, owned by said Terre Haute & Logansport Railway Company, in the said City of South Bend, and particularly the land, tracks and yard over and on which the relator herein claims and contends that said Calvert or Elmira Street is located and established. On December 5, 1898, said Master in Chancery made his report to said Court, showing the sale of said property to said Brooks and the payment of the purchase price by him, and the execution of said deed to this defendant, and asked that said sale and the execution and delivery of said deed be confirmed and approved. Thereupon, said court ordered that said report be filed as of December 1, 1898, and confirmed and approved said deed and the execution and delivery thereof to this defendant, who had received complete possession of all said property so conveyed to it by said deed at midnight of November 30, 1898. And prior to November 30, 1898, this defendant paid to said Brooks the full amount of his bid aforesaid, and ever since that date has owned and been in possession of and now owns and is in possession of the property conveyed to it by said deed.

"And the defendant says that said Benjamin Harrison, trustee, the grantee in said trust deed, was not a party to said proceedings, had before and by the Board of Trustees of the Town of Myler, for establishing and locating said Elmira Street, and neither was the holder of any of the bonds secured by said trust deed, and no notice of said proceedings was given to said Harrison, trustee, or to any bondholder, and neither had any notice or knowledge thereof, and no damages for the opening of the street were assessed, paid or tendered to either.

"At the time of the purchase of said mortgaged property by

said Brooks, and of the payment of the purchase price therefor by him, and of the conveyance of said property to this defendant as aforesaid, neither he nor the defendant had any notiec or knowledge of said proceedings to locate said Elmira Street, or of the existence of any street at the place across said tracks and yard where the relator now claims said street to be.

"And this defendant says that in this action it is sought to appropriate its property acquired by virtue of the decree aforesaid rendered in the Circuit Court of the United States, for the district of Indiana, without due process of law and without compensation, in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant now claims immunity under said Fourteenth Amendment from having its property taken from it by means of this action, without compensation and without due process of law."

The opinion of the Supreme Court of the State of Indiana, affirming the judgment of the Saint Joseph Circuit Court, is reported in 166 Ind. 219, and is printed in this Record beginning on page 26.

ASSIGNMENT OF ERRORS.

By its assignment of errors in this Court (Rec. 38) the plaintiff in error alleges:

1. That the Supreme Court of Indiana erred:

a. In sustaining the demurrer of the plaintiff, the State of Indiana, and the relation of the City of South Bend, to the return of the defendant, The Terre Haute & Logansport Railway Company, to the alternative Writ of Mandate issued in said cause, in so far as said return is based upon the Constitution of the United States and the rights of said defendant secured thereby.

b. In rendering the judgment in said cause, whereby it

affirmed the ruling of the Saint Joseph Circuit Court of Saint Joseph County, Indiana, in sustaining the demurrer of said The State of Indiana on the relation of the City of South Bend, to the return of the defendant, The Terre Haute & Logansport Railway Company, to the alternative writ of mandate issued in said cause, in disregard of the rights of said defendant and of this appellant, Vandalia Railroad Company, its successor, guaranteed by the Fourteenth Amendment to the Constitution of the United States, and specially averred and set up in said return.

2. That the judgment and proceedings in this cause deprive this appellant, Vandalia Railroad Company, of its property without due process of law, and deny to it the equal protection of the laws in contravention of the Constitution of the United States.

ARGUMENT.

1.

On Subject of Jurisdiction of this Court.

The Federal Questions were properly raised and this Court has jurisdiction of the cause. As heretofore shown the Return to the Alternative Writ of Mandate set up the fact that The Terre Haute & Logansport Railway Company acquired its title to the railroad property, of which the intersection in question is a part, under and by virtue of the decree of the Circuit Court of the United States for the District of Indiana, and the subsequent proceedings, including the execution of the deed and the approval thereof by the Court, based upon this decree, all of which were alleged in detail, and then directly averred that, by this suit, it was sought to appropriate its property, acquired by virtue of the decree, without due process of law and without compensation, in violation of the Fourteenth Amendment to the Constitution of the United States, and asserted the claim of the railway company to immunity under this Amendment. Thus a

particular federal question was directly raised by the only plea, tendering an issue of fact, filed by the defendant, railway company, and now in the record. The State Supreme Court avoided or evaded the consideration of this question by declaring that the return was grounded upon a certain theory, to which the allegations by which the federal question was presented, were unnecessary. The Court say in the opinion, after stating its conclusion, that the theory of the return was what it was declared to be, *"This conclusion forbids a discussion of the various steps taken in the proceedings to establish Elmira Street, as well as the constitutional question raised."* (Rec. foot of p. 31.)

Under the statute and the decisions of this Court, this condition of the record presents a federal question and gives this Court jurisdiction upon the grounds:

First. It appears that there was a denial by the State Supreme Court of authority exercised under the United States, in that such Court refused to consider and thereby, in effect, decided against the title and right of plaintiff in error, specially set up and claimed under such authority, or, to be more direct, that Court refused to consider, and by so doing decided against, the title and right of the plaintiff in error to the free and unincumbered use of that part of its right of way and railroad over which it is claimed said Calvert Street exists, its title and right to said right of way and railroad having been acquired under and by force of the judgment and decree of the Circuit Court of the United States, all as specially set up and claimed.

Sec. 709, U. S. R. S.

Dupasseur v. Rochereau, 21 Wallace 130.

Crescent City, etc., Association v. Butcher's Union, etc., Co., 120. U. S. 141; 75 Sup. Ct. 475.

Pittsburg, etc., Ry. Co. v. Long Island, etc., Co., 172 U. S. 493; 19 Sup. Ct. 238.

The above cited statute enacts, among other things, that a writ of error from this court will lie to the highest court of the State in which a decision in the suit could be had, "Where any

title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such constitution, treaty, statute, commission or *authority.*"

Dupasseur v. Rochereau, supra, was a case in which Rochereau sued Dupasseur, in one of the courts of the State of Louisiana, to compel him to pay off a lien against a certain plantation in that State, of which the latter had possession, or to give up the plantation. Dupasseur answered:

"That he purchased the property described in the plaintiff's petition at a sale made by the marshal of the United States, in virtue of an execution issued on a judgment rendered by the Circuit Court of the United States for the Eastern District of Louisiana, in the case of Edward Dupasseur v Pierre Sauve, free of all mortgages and incumbrances, and especially from the alleged mortgage of the plaintiff; that the marshal's sale was made in virtue of a judgment based on and recognizing the existence of a superior privilege and special mortgage to that claimed by the said plaintiff; and that the whole of the proceeds of said sale was absorbed to satisfy the judgment in favor of this respondent, except $15,046, which are in the said marshal's hands, subject to the payment, pro tanto, of the plaintiff's mortgage."

At the trial judgment was given for Rochereau. Upon appeal, the Supreme Court of the State affirmed this judgment. Then Dupasseur brought the case to this court by writ of error, claiming "that the State Court decided against the validity of a judicial decision in his favor made by the Circuit Court of the United States on the very question at issue in this action, which decision was set up and relied on by him in his defense," and that, therefore, the case fell within the terms of the statute above

quoted. This claim was upheld, the Court, by Mr. Justice Bradley, saying:

"Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the State courts."

* * * "We cannot hesitate, therefore, as to our jurisdiction to hear the case."

In Crescent City, etc., Association v. Butchers' Union, etc., Co., *supra,* which was an action for malicious prosecution, the defense was that the existence of probable cause had been previously determined by a judgment in the Circuit Court of the United States. It was contended that the Supreme Court of Louisiana failed to give proper effect to that judgment and thereby denied to the defendant a right arising under the authority of the United States. The case came up to this Court on writ of error and its jurisdiction was upheld, Mr. Justice Matthews speaking for the Court saying: "It must therefore be conceded that the sole question to be determined is, did the Supreme Court of Louisiana, in deciding against the plaintiffs in error, give proper effect to the decree of the Circuit Court of the United States, subsequently reversed by this Court?

"It is argued by counsel for the defendant in error that this does not embrace any federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana, or by some principle of general law, as to which the decision of the State Court is final; and that the ruling

in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the Constitution or Laws of the United States.' But this is an error. The question whether a State Court has given due effect to the judgment of a Court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal Courts by proper process."

Pittsburg, etc., Ry. Co. v. Long Island, etc., Trust Co., 172 U. S. 493; 19 Sup. Ct. 238, was a case in which it appeared that, in an action brought by the Trust Company's testator in one of the Common Pleas Courts of the State of Ohio, against the Railway Company, to enforce a lien for the payment of certain bonds, the latter claimed by its answer that if a lien attached to the railway property in question, at any time, to secure the payment of the said bonds, such lien was divested by certain decrees and proceedings thereunder, theretofore entered and had in the Circuit Courts of the United States, whereby the railway property had been ordered sold and was sold and the sales thereof confirmed by said Circuit Courts. Upon a trial of the case the Common Pleas Court rendered judgment for the plaintiff. This judgment was affirmed by the State Supreme Court and the case reached this Court on writ of errer. It was contended that this Court had no jurisdiction upon the ground that the record presented no federal question, and that the State Court based its decision upon an independent ground, not involving a federal questions, but depending upon principles of general law, and broad enough to sustain its judgment. The Court, speaking by Mr. Justice Harlan, disposed of this contention upon the authority of Dupasseur v. Rochereau and Crescent City, etc., Co. v. Butchers' Union, etc., Co., *supra,* which were reviewed at length, and upon a consideration of the statute (Sec. 709, R. S.), saying, in conclusion, upon this point, "According to these decisions, and in view of the statute giving this Court authority to re-examine the final judgment of the highest court of the State denying a right specially set up or claimed under an authority exercised

under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the circuit courts of the United States, under which the plaintiff in error claims title to the lands and property in question."

Clearly, then, speaking generally, under the plain words of the statute and under the same as it has been construed and applied here, this Court has jurisdiction of a cause in which it appears from the record that the highest State Court failed to give proper effect to a decree of a Circuit Court of the United States.

It must be and is conceded that, in a case of this character, the "federal right, title, privilege, or immunity must be * * specially set up or claimed, to give this Court jurisdiction."

Columbia Water Power Co. v. Columbia Elect. St. Ry., L. & P. Co., 172 U. S. 475; 19 Sup. Ct. 247-252.

"But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the State Court in such manner as to bring it to the attention of that court."

Green Bay & M. Canal Co. v. Patten Paper Co., 172 U. S. 58; 19 Sup. Ct. 97-100.

Dewey v. City of Des Moines, 173 U. S. 193; 19 Sup. Ct. 379.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648; 17 Sup. Ct. 709.

In the last cited case it was declared that the earlier cases in this court which had held that it was necessary "to refer to the precise words or to the particular section of the constitution under which some right, etc., was claimed, had been modified so that the particular reference was no longer necessary, provided it appears affirmatively from the record that a right, title, privilege

or immunity is specially set up or claimed under that instrument, or under the authority of the United States."

By its return to the Alternative Writ of Mandate the railway company clearly averred the facts showing that its title to the railroad property, including the alleged street intersection, is based upon the decree of the Circuit Court of the United States, and the sale of the property thereunder and that the trustee in the trust deed, which was foreclosed by said decree, had no notice or knowledge of the proceedings to open the street, and that the purchaser of the property at the Master's sale had no notice or knowledge, neither had the railway company when it purchased the property, of the proceedings to locate the street or of its existence. These averments present the claim, in unmistakable terms, that the effect of the decree of the Circuit Court and of the other facts in respect to knowledge and notice, averred to show that the railway company was not bound, notwithstanding the decree, was to vest title to the property, unincumbered by the street, in the railway company.

We believe that this Court has jurisdiction to review the judgment of the State Supreme Court upon this first ground, viz.: That the decision of that Court was against the title and right of the railway company claimed under authority exercised under the United States and specially set up and claimed.

Second. The return of the railway company to the Alternative Writ of Mandate, after averring the facts constituting the first ground for the assertion that this Court has jurisdiction, makes the direct and positive allegation of the existence of a federal right in the following words: "And this defendant says that in this action it is sought to appropriate its property acquired by virtue of the decree aforesaid rendered in the Circuit Court of the United States, for the district of Indiana, without due process of law and without compensation, in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant now claims immunity under said Fourteenth Amendment from having its property taken from it by means

of this action without compensation and without due process of law." (Rec. 15.) This would seem to meet even the stringent requirements of the earlier cases in this Court, of which Maxwell v. Newbold, 18 How. 511, is an example. Upon this ground, viz.: That the State Court decided against the immunity claimed under the constitution, the return leaves nothing to inference but the averments are "so distinct and positive as to place it beyond question that the party bringing the case here * * * intended to assert a federal right."

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648; 17 Sup. Ct. 709, 711.

Green Bay & M. C. Co. v. Patten Paper Co., 172 U. S. 58; 19 Sup. Ct. 97, 100.

As heretofore urged, the claim to immunity was timely made since it was made by the first pleading filed by the railway company, and now in the record, after the overruling of its demurrer to the Alternative Writ.

But it may be said that the decision of the State Supreme Court was not against the title and right and immunity specially set up and claimed under authority exercised under the United States and under the constitution. As already intimated, the State Supreme Court declared that the return to the Alternative Writ was based upon the theory that the contract between the railway company and the City of South Bend, relator (Rec. 16), was a bar to the action for the mandate, and, having so declared, held, using its own words, that, "This conclusion forbids a discussion of the legality of the various steps taken in the proceedings to establish Elmira Street, as well as the constitutional question raised." (Rec. 31, foot of page.) Under the authorities this amounts to, and, in effect, is a decision against the federal right and immunity claimed.

Minneapolis, etc., Ry. Co. v. Gardner, 177 U. S. 332; 20 Sup. Ct. 656.

Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 576; 17 Sup. Ct. 198-205.

Mitchell v. Clark, 110 U. S. 633, 645; 4 Sup. Ct. 170, 176.

Kaukauna Water Power Co. v. Green Bay, etc., Canal Co., 142 U. S. 254; 12 Sup. Ct. 173.

Chicago, B. & Q. R. Co., v. Illinios, ex. rel. Grimwood 200 U. S. 561; 26 Sup. Ct. 341, 344.

Minneapolis & St. L. R. Co. v. Gardner, *supra,* was a case in which a motion to dismiss was made upon the ground that this Court had no jurisdiction, one contention being that there was a question, not federal, decided by the State Supreme Court, sufficient to support its judgment. Upon this contention this court, speaking by Mr. Justice Kenna, said:

"But it is said the State Court did not decide the federal question, but decided that the act of 1881 created a new corporation, which became subject to the constitutional provision imposing liability upon stockholders for corporate debts, and that the Court rested its judgment on that construction. The Court said: 'Whatever may be the liability of the several (constituent) corporations we need not inquire, because the liability here sought to be enforced is one against individuals who have been and are stockholders in the new corporation.' And again: 'Other questions have been raised and discussed by the respective counsel, but a decision upon them by this court in this action is entirely unnecessary, and we express no opinion thereon.' This was in effect to deny the existence of the contract claimed by plaintiffs in error. But it is the duty of this court to decide for itself the fact of contract and its impairment, and the motion to dismiss must therefore be denied."

In Covington & L. Turnpike Road Co. v. Sandford,*supra,* this court said, "When a party specially sets up and claims a right or privilege under the constitution or laws of the United States, the question of the sufficiency of allegations to present that issue is not concluded by the view expressed by the State Court."

Mitchell v. Clark, *supra*, is a case in which Clark sued Mitchell for rent due on a lease of two buildings in St. Louis, Missouri. One paragraph of answer alleged that the rent sued for had been paid to the military authorities of the United States upon the order of General Schofield, then in command of the military district of which St. Louis was a part, in accordance with a certain act of congress, etc. In this Court it was contended that the Supreme Court of Missouri held the answer bad because it did not set out a copy of the order of Gen. Schofield on which the defense was founded, either *in haec verba* or in substance, and that this, not being a question of federal law, was sufficient to sustain the judgment of that Court. The Court said: "But there are several answers to this. * * (3) The question whether a plea sets up a sufficient defense when the defense relied on arises under an act of congress, does present, and that necessarily a question of federal law; for the question is, and must be, does the plea state facts which, under the act of congress, constitute a good defense?" Expressed in general terms the rule thus declared is that the jurisdiction of this court is not withheld by the adherence of the highest State Court to some local rule of practice, which, if given the effect it should have in the State Court, excludes from consideration the federal question raised in the record.

In Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood, *supra*, the question of the constitutionality of a certain section of a drainage statute of the State of Illinois was raised by a special demurrer of the railroad company to a petition of the defendant in error for a mandate. This demurrer was over-ruled in the lower court; and, on appeal to the Supreme Court, this action of the lower court was assigned as error. In its opinion affirming the judgment appealed from, that Court said, "Entertaining the views above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of Sec. 40½ of the farm drainage act." In this court it was contended by defendant in error that, as the State Court based its judgment

on the common-law duty of the railroad company and not expressly upon any federal ground, there was no denial of the federal right claimed by the company. In disposing of this contention the Court said:

"But it is equally well settled that the failure of the State Court to pass upon the federal right or immunity specially set up, of record, is not conclusive, but this Court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed action of the drainage commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. *And that result could not be avoided merely by silence on the federal question* and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supercede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid then the law is for the railway company; for the supreme law of the land must always control. Therefore a failure to recognize such federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of federal right or immunity had been expressly denied."

This case seems to be decisive in favor of the jurisdiction of this court upon either and both grounds herein urged. The claims of federal right and immunity were specially set up and were denied upon the ground that a local rule of practice, as applied by the State Supreme Court, made it unnecessary to decide the federal questions.

ARGUMENT ON THE MERITS.

As heretofore shown under the sub-title "Statement of the Case" it appears from this record that the verified complaint of defendant in error alleged that there was a certain street in the City of South Bend, having an established grade and known as Calvert Street, which extended east and west and intersected the right-of-way and tracks of the original defendant, the Terre Haute & Logansport Railway Company, at a place particularly described, and that the same had not been opened across the defendant, is right-of-way and tracks, and that the defendant, though notified so to do, had refused to open the Street and to plank between its tracks and to make the crossing passable. The allegation of the existence of the street across the right-of-way of the defendant was a vital allegation. The return to the alternative writ met this allegation by averments to the effect that the title of the defendant, the Terre Haute & Logansport Railway Company, was derived through and based upon a decree of the Circuit Court of the United States for the District of Indiana, foreclosing the mortgage executed by the original company, namely, the Terre Haute & Logansport Railroad Company, to Benjamin Harrison, Trustee, and ordering the sale of the railroad property, including the part of the right-of-way and tracks, over and on which the defendant in error claims the street to exist, and the sale of said property by the Court's officer to J. T. Brooks, the payment of the consideration by him and the execution of a deed to the defendant in the lower court, the Terre Haute & Logansport Railway Company, and the confirmation of the sale and the approval of the deed by the court, The institution of the proceedings before the board of trustees of the town of Myler to establish said street and the continuation of these proceedings are alleged in detail. Then it is averred that the Terre Haute & Logansport Railroad Company, which then owned said land and the railroad, was not served with notice of the meeting of the commissioners appointed by the board of trustees of the town to assess damages and benefits and that it did not attend the meeting of the commissioners or any

meeting of the board of trustees at which any proceedings were had in respect to locating the Street and that it did not become a party to said proceedings in any manner whatever. (Rec. 13). It is averred further that the mortgage to Benjamin Harrison, Trustee, was executed on January 1, 1883, (Rec. 13) which was long before the commencement of the proceedings to locate the street, and that the same was duly recorded in the proper county, and that no notice of the proceedings to open the Street was given to the trustee and that he had no notice or knowledge thereof and that no damages for the opening of the street were assessed, paid or tendered to him (Rec. 14.) It is also alleged that when said Brooks purchased the railroad property under the decree of the Court and when he paid the purchase price therefore and when the conveyance of the property was made to the Terre Haute & Logansport Railway Company, neither had any knowledge of the proceedings to locate the street or of the existence of the street (Rec. 15). The further allegation is made that neither the relator nor the public had acquired the right to use the ground and space across the yards and tracks, where the relator claims the street to exist, in any other manner than by said proceedings before the board of trustees and that these proceedings were wholly insufficient to establish the street as against the railroad company (Rec. 17); and that said town of Myler was annexed to the City of South Bend in 1902 (Rec. 12).

Upon the facts thus summarized the plaintiff in error contends that said Calvert Street was never laid out and established, and has no existence, as against it and its said railroad property, and that to require it to open the street across its right of way, tracks and yards, and to plank the crossing, as commanded by the writ of mandate, would amount to an appropriation of its property acquired by virtue of the decree of the United States Circuit Court, without due process of law and without compensation.

POINTS AND AUTHORITIES.

1. The statute of the State of Indiana governing the giving of notice in proceedings to locate streets in towns, in force when the attempt was made to establish said Calvert Street, reads as follows: "2. When, upon petition signed by twelve freeholders, residents of any town, the board of trustees of such town may be of the opinion that public convenience requires the opening of a new street or alley, or widening or narrowing of a street or alley already opened, the board of trustees shall appoint three commissioners, residents of said town, who shall be disinterested freeholders, to appraise and assess the damages and benefits accruing to the owner of any land or lot through which any street or alley is proposed to be constructed or altered, or any building or structure thereon appropriated, as provided in the preceding section. Such commissioners shall, before they proceed to perform their duties as said appraisers, take and subscribe an oath or affirmation faithfully to perform their duties as such appraisers; which shall be indorsed upon or attached to their appointment, and filed with the clerk of the board. Twenty days' notice shall be given such commissioners by the board of trustees, through the town clerk, of the appraisement to be made, giving a complete description of the premises to be viewed. A like notice shall be given by personal service, or by leaving the same with some person of suitable age at their reputed place of abode, to each of the owners or agents of lots or lands upon or through which the public improvement or street or alley is proposed to be made. If the owners are unknown or non-residents, publication of the same in one or more newspapers of the town, or by posting up written notices in six public places in the town (if there be no newspaper published therein), for three weeks, shall be deemed equivalent to such personal service."

2. In Indiana, a mortgagee is an *owner* within the meaning of the statute governing the location of streets, and as such is entitled to notice.

Sherwood v. City of Lafayette, 109 Ind., 411.

This is the rule in most jurisdictions.

Elliott on Roads and Streets, 2 Ed., Sec. 308, 310.
Lewis on Eminent Domain, Vol. 2, Sec. 324.
Am. & Eng. Ency. of Law, Vol. 10, 2 Ed., p. 1192.
15 Cyc. p. 845.

3. The only notice to land owners required by the Statute of Indiana governing the location of streets in towns, in force when the proceedings to open Calvert Street in the town of Myler were had, was the notice of the meeting of the commissioners provided for by Sec. 4405, quoted above. This notice was necessary to confer jurisdiction over the person, and failure to give it rendered the order establishing the street void as to the party not notified.

City of Fort Wayne v. Fort Wayne, etc. R. Co., 149 Ind., 25.
Elliott on Roads and Streets, 1 Ed., p. 242.
Town of Cicero v. Williamson, 91 Ind., 541, 544.
Board of Commissioners, etc., v. Gruver, 115 Ind., 224.
Kuntz v. Sumption, 117 Ind., 1, 4.
Hobbs v. Board of Commissioners, etc., 103 Ind., 575, 578.
Vizard v. Taylor, Treas., 97 Ind., 90.

4. As to the trustee, the case presented by this record is not a case of defective notice or of some notice, but it is a case of no notice. In such case the action of the board of trustees, an inferior tribunal having no other powers than those expressly conferred by statute, does not imply an adjudication upon the

subject of its jurisdiction so as to make its final act in establishing the street impervious to a collateral attack.

Hobbs v. Board of Commissioners, 103 Ind., 575, 579.
Board of Commissioners v. Gruver, 115 Ind., 224.
McCollum v. Uhl, 128 Ind., 304, 307.

5. The trustee or mortgagee not having had notice as required by law, of the proceedings to locate and establish the street in question here, and not being a party thereto, was wholly unaffected by such proceedings and the same were and are void as to him.

City of Fort Wayne v. Fort Wayne etc. R. Co., 149 Ind., 25.
State etc. v. Easton and Amboy R. Co., 36 N. J. Law, 181, 185.
Platt v. Bright, 29 N. J. Eq., 128.
In re Onida Street (Onondaga, N. Y. County Court) 49 N. Y. Supp't, 828, 832.
Dodge v. Omaha & S. W. R. Co. (Neb.), 29 N. W., 936.
Severn v. Cole, 38 Ia., 463.
Warwick Sav. Inst. v. Providence, 12 R. I., 236.
Silva v. Garcia (Cal.), 4 Pac., 628.
Missouri Pac. Ry. Co v. Houseman (Kas), 21 Pac., 284.
Names v. Comimssioners, etc., 30 Mich., 490.
15 Cyc., 843, and authorities cited.

6. The trust deed or mortgage upon which the title of plaintiff in error to the railroad property is based was executed on January 1, 1883, and recorded within forty-five days thereafter, more than eight years before the attempted appropriation of a part of the property for street purposes. The deed to the Terre Haute & Logansport Railway Company under the decree of the Circuit Court of the United States foreclosing that mortgage was confirmed and approved by that Court on December 5,

1898. This deed related back to the date of the mortgage and its effect was to vest the title to the railroad property in the Terre Haute & Logansport Railway Company, free from any intervening rights and especially free from the attempted appropriation for street purposes, the same not being valid as against the mortgagee for want of notice.

2 Jones on Mortgagee, 4th Ed., Sec. 1654.
Jarrell v. Brubaker, 150 Ind., 260, 267.
Bateman v. Miller, 118 Ind., 345, 349.

7. Under the facts stated in this record the opening of the street across the right-of-way, tracks and yard of plaintiff in error and the planking of the crossing to make the same passable will constitute a taking of property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States. Two of the indispensable elements of due process of law are, first, notice, and, second, opportunity to be hearl—in a proceeding to establish a street in a town under the statute above quoted, notice of the meeting of the commissioners to assess benefits and damages and opportunity to be heard upon the issue of the right to lay the street where proposed to be laid and upon the issue of damages. Both of these issues were necessarily raised against the trustee or mortgagee by the proceedings to take a part of or an interest in the mortgaged property for the street.

Elliott on Roads & Streets, 2 Ed., Sec. 197.
Am. & Eng. Ency. of Law, 2 Ed., Vol. 10, p. 300.
Lewis on Eminent Domain, 2 Ed., Sec. 365.
Garvin v. Dausman, 114 Ind., 429.
City of Fort Wayne v. Fort Wayne etc. R. Co., 149 Ind., 25.

8. The opening of the street now across the right-of-way, tracks, and yard of plaintiff in error and requiring it to plank the crossing and to make and maintain the same siutable and safe for use as a public street or highway will constitute a taking

of property without compensation in violation of both the State and Federal Constitutions.

Constitution of Indiana, Art. 1, Sec. 21.
Constitution of U. S., Art. 14, Sec. 1.
City of Fort Wayne v. Fort Wayne etc. R. Co., 149 Ind., 25.
Indianapolis etc. Gravel R. Co. v. Belt Railway Company, 110 Ind., 5, 12.

9. Under the allegations of the return to the alternative writ of mandate, what may be presumed to have been intended for notice to the Terre Haute & Logansport Railroad Company, then the owner of the railroad property, subject to the mortgage, and in the actual possession and use of the same, of the meeting of the commissioners to assess damages and benefits, was wholly insufficient to confer jurisdiction of the person. It definitely appears that the notice was served on "Vandalia Ry. Co." and that Vandalia Ry. Co. had not then any title to or interest in the railroad or railroad property and that the Terre Haute & Logansport Railroad Company was not served with notice and did not become and was not a party to said proceedings. The statute provided that notice should be given "to each of the owners or agents of lots or lands upon or through which the public * * * street * * * is proposed to be made" by personal service or "by leaving the same with some person of suitable age at their reputed place of abode." Conceding for the moment that a valid notice to the mortgagor, the Terre Haute & Logansport Railroad Company, would have been sufficient to bind the mortgagee and persons having title to the property under him, yet there was no such notice.

Elliott on Roads and Streets, 2 Ed., Sec. 322, 324.
Vizard v. Taylor, Treas., 97 Ind., 90, 94.
Jackson v. Dyar, 104 Ind., 519.
Lewis on Eminent Domain, 2 Ed., Vol. 2, Sec. 377, 378 and authorities cited.
Kirkpatrick Const. Co. v. Central Electric Co., 159 Ind., 639.

APPLICATION OF FOREGOING POINTS AND AUTHORITIES TO THE CASE.

As stated by Mr. Lewis in his work on Eminent Domain (2 Ed., Vol. 2, Sec. 324), "On the question whether mortgagees are necessary parties to condemnation proceedings, the authorities are not only conflicting but very unsatisfactory." It then becomes necessary to determine the rule of each state. In Indiana is has been squarely held that a mortgagee is an owner within the meaning of a statute providing for notice to owners in cases for the appropriation of lands for streets in a city. (Sherwood v. City of Lafayette, 109 Ind., 411.) The Statute so construed read "a like notice shall be given by personal service, or by leaving the same with some person of suitable age, at their reputed place of abode, to each of the owners or agents thereof, of lots or land upon or through which the * * * street is proposed to be made." (2 Gavin & Hord's Ind. Statutes, Vol. 1, p. 231, Sec. 60.) The above language on the subject of notice is identical with that of the statute herein quoted and providing for notice in cases of establishing streets in towns, in force when the proceedings to establish the street in question here, were had. The Supreme Court of Indiana, in the course of the opinion by Elliott, C. J., says, "while the mortgage does not convey title to the land, it nevertheless does convey to the mortgagee an interest in the land itself of which he cannot be divested." And further "In Severin v. Cole, 38 Iowa, 463, the question was examined with care and it was said that: 'The mortgagor, it is true, holds the legal title; but the mortgagee has an equitable interest in, or right to, the mortgaged property, and under the above statute is an owner of the real property.' " And still further, "It is only by adopting this view of these authorities and treating the mortgagee as an owner within the meaning of the statute, that the statute itself can be upheld, for it is very clear upon principle and auhority, that the mortgagee does own some interest in the land which can not be divested except by due proceedings under 'the law of the land.' Soulard v. United States,

4 Peters, 511. * * Nor is any violence done to the language of the statute in treating a mortgagee as an owner, for, in a limit-sense, he is an owner, as he has a proprietary interest in the land itself." The decision in this case has not been overruled or questioned and is the law of the state.

If the trustee for the bondholders in the trust deed or mortgage involved here was, then, entitled to notice and no notice was given him, it is fundamental that the proceedings to establish the street were ineffective and void as to him. Judge Elliott, late of the Supreme Court of Indiana, in his work on Roads and Streets, 1 Ed., p. 242, states the rule thus: "When notice is required, it is essential to confer jurisdiction, for without some notice there is no jurisdiction, and the proceedings are absolutely void." While the forms of expression differ, all the authorities agree that the foregoing statement is the law. If the proceedings are void, they are the same as though they had never had any existence. Then in 1896, when the trustee brought his action in the Circuit Court of the United States to foreclose his mortgage, he held the right and interest in the railroad property acquired by him on January 1, 1883, unaffected by the attempted appropriation of the street crossing. When the decree of the court was rendered and the railroad property ordered sold it was unincumbered by any right of the public to the alleged street crossing. The return to the writ of mandate avers that when the railroad property was sold by the Court's officer and bid in by J. T. Brooks, and when he paid the amount of his bid, and when the property was conveyed to the Terre Haute & Logansport Railway Company, neither he nor it had any notice or knowledge of the proceedings to establish the street or of the existence of the street. It is undoubtedly the law of Indiana, and perhaps everywhere, that upon the complete execution of a deed based upon a decree foreclosing a mortgage, which has been duly recorded, the deed rlates back to the time of the execution of the mortgage and has the effect to cut off any rights and equities acquired by third persons in or to the mortgaged property, between the times of the execution of

the mortgage and the deed, in respect to which rights and equities the mortgagee may not, in some manner, have become bound. Mr. Jones states the rule as follows: "Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights." (Jones on Mortgages, 2 Ed., Vol. 2, Sec. 1654.) This is the rule in Indiana. It appears from the record in this cause that the street has never been opened. The object of the action is to compel the company to open the street across its right-of-way, tracks and yard. If the right exists to appropriate a crossing at the particular place where defendant in error claims it exists, the right can yet be exercised in a lawful manner. The authorities hold that when appropriation proceedings have been had to which the mortgagee was not a party, his interest may be divested by a subsequent condemnation, and that the damages will be assessed as of the time of entry. (See Lewis on Eminent Domain, 2 Ed., Vol. 2, Sec. 324.) In the case of an ordinary mortgage, if the mortgagor sells a part of the mortgaged land, the right of the purchaser, as against the mortgagee, is the right to redeem by paying the entire mortgage debt. He has no other right. In this instance, conceding that the town of Myler originally had, and the relator now has, the right, as aaginst the trustee, or present owner of the property, to pay the mortgage debt, neither could make the redemption for want of power so to do. Therefore to preserve the right of both the company and the municipality in such cases the right to institute subsequent condemnation proceedings exists.

The question here is not one between the mortgagee and the public or the relator as the representative of the public, but it is one as between the plaintiff in error, as the successor in ownership of the railroad property, to the Terre Haute & Logansport Railway Company, to whom the deed under the foreclosure was executed, and the relator as the successor to the town of Myler. It is a presumption that the railway company paid all the property was worth as it stood, unaffected by the proceedings to locate the street, of which it had no knowledge, at the time it re-

ceived its deed. It acquired the property as the mortgagee held it and as it was when the decree for its sale was made. It is a fair presumption that with this street opened, or established and to be opened, across the tracks and yard in the city of South Bend the price paid would have been materially less. Indeed, the return shows that the railway company was willing to expend $30,000, in a compliance with the compromise agreement with the city, made to avoid a grade crossing at the place where the street is claimed to be. (Rec. 16.)

Clearly then, upon the authorities cited, without reference to any notices to the Terre Haute & Logansport Railroad Company, of the proceedings to establish the street, to require plaintiff in error to open the street and to plank the crossing would be to take its property without due process of law and without compensation and in violation of the decree of the United States Circuit Court.

But there was no notice to the railroad company which, the return avers (Rec. 13), owned the railroad and the land attempted to be appropriated. The return of the town marshall to the notice shows service by reading on "Vandalia Ry. Co." (Rec. 12). The return to the alternative writ avers that "Vandalia Ry. Co at the time said notice was served, had no title to nor interest in either said land or said Terre Haute & Logansport Railroad." (Rec. 13). Service upon Vandalia Ry. Co., assuming that there was such a person or corporation, can not be service on the Terre Haute & Logansport Railway Company. "Notice must be given substantially in the manner prescribed by the statute, and to the persons designated. When the statute provides for personal service on resident parties no other notice will be sufficient." Elliott on Roads and Streets, 2 Ed., Sec. 322. The Terre Haute & Logansport Railroad Company was a resident of the town of Myler and was entitled to personal service of the notice of the meeting of the commissioners. The statute quoted above provides for service of notice, personally, upon known rsident owners or agents of lots or lands. When notice is required it must be given as provided by law to confer jurisdiction. Knowledge, no matter how acquired, is insufficient.

It can not be properly said, in view of the facts as set forth in this record, that the Tere Haute & Logansport Railroad Company had notice of the proceedings to establish the street. Hence the result is not changed, if the rule prevailing is some jurisdictions, that notice to the mortgagor binds the interest of the mortgagee, be adopted.

Respectfully submitted by
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 36.

Vandalia Railroad Company,
Plaintiff in Error,
vs.
The State of Indiana ex rel. The City of South Bend, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF STATE OF INDIANA

BRIEF FOR THE DEFENDANT IN ERROR.

FRANK H. DUNNAHOO,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 26.

Vandalia Railroad Company,
Plaintiff in Error,

vs.

The State of Indiana ex rel. The City of South Bend, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF STATE OF INDIANA

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The statement of the case set forth in the brief for plaintiff in error is substantially correct except as to the summary of the return to the alternative writ. The return to the alternative writ is long and involved. Counsel for plaintiff in error in summarizing the allegations of the return by omissions fail, we believe, to show the true scope and theory of the pleading and the issue presented thereby. The summary lays stress upon those allegations which, it is asserted made the issue a federal question, when

in fact the issue presented was the validity of the contract involved in the litigation—that is, a local question. The summary stops at the point where immunity is claimed under the Fourteenth Amendment to the Constitution of the United States, and fails to set forth those allegations which, in the opinion of the Supreme Court of the State of Indiana, were determinative of the theory of the pleading. We maintain the pleadings and record in this case, particularly the return to the alternative writ as set forth on page 11 of the record, and the opinion of the Supreme Court of the State of Indiana as set forth on page 26 of the record, conclusively show that the grounds relied upon by the plaintiff in error in its defense throughout the course of litigation was the validity of the contract entered into by the parties to this action sometime prior to the institution of the suit by the defendant in error. The return after admitting introductory allegations of the verified petition proceeds,

"And the defendant says that it so failed and refused to make a crossing over its tracks at present grade at said place, and further that it ought not to be required to make any such crossing at such place by reason of the following facts."

Here follows detailed statement of facts relied upon to show want of notice to the owner or mortgagee of the railroad company at the time the condemnation proceedings were had to open Elmira Street across the railway, and claim of immunity is supposedly made. The return to the writ then proceeds:

"And the defendant further says that for some time the relator has claimed and praticularly in the year, 1901, it claimed that by virtue and force of said proceedings, had by and before the Board of Trustees of the Town of Myler and not otherwise, said Calvert or Elmira Street, was located and established across the right of way, lands, tracks and yard of this defendant, all of which the defendant, by reason of the facts hereinbefore set

forth, in good faith denied. Thereupon, and on January 17, 1902, for the purpose of adjusting and settling the said conflicting claims of the relator and defendant, the relator, acting by its then Board of Public Works made and entered into a contract whereby the defendant agreed to construct a steel viaduct above and across its tracks at said Elmira Street, where claimed by the relator, and the relator agreed to construct the approaches thereto, and each agreed to perform the other agreements set forth in said contract which is in writing and which was reported to the Common Council of said City of South Bend, which, by ordinance duly passed and enacted, ratified and approved said contract. Said ordinance and said contract are in the following words":

The return then sets out in full the contract ordinance between the parties, providing for a waiver of the right of the defendant in error to enforce a crossing at grade, and the construction of a viaduct upon certain conditions. Then the following allegations are made:

"And the defendant says that the construction of said steel viaduct according to the plans and specifications will require an expenditure by it of $30,000, and yet, it avers that, since the ratification of said contract, it has always been, and now is ready, able and willing to perform all the agreements contained in said contract to be performed by it. But the defendant says the relator has performed none of the agreements contained in said contract to be performed by it, and that it has not given to the defendant any written or other notice to construct said viaduct according to the provision of said contract. The street designated Elmira Street in said contract is the same street designated Calvert Street in the application and writ herein.

"And the defendant says that at the times the verified application herein was filed and the alternative writ of mandate herein was issued and served, the relator has not, nor had the public acquired the right to use the ground and space across its yards and tracks where the relator claims said street to exist,

as and for a street or highway, in any other manner than by the said proceedings had by and before the Board of Trustees of said Town of Myler, hereinbefore set out, and it avers that said proceedings were wholly insufficient to establish a street or highway at said place as against it for the reasons hereinbefore set forth in this return.

"WHEREFORE, the defendant says that it ought not to be compelled to open said alleged street across its tracks and yard at grade as commanded by said alternative writ, and it prays judgment accordingly."

We direct the Court's attention particularly to the above allegations of the return for the reason that we submit they have been the determining allegations of the case at its every step, and disclose the fact that the real issue tendered by the return does not involve a federal question; therefore, this Court is without jurisdiction.

ARGUMENT.

I

On the Subject of Jurisdiction of this Court.

The alleged federal questions were not properly raised. This Court is without jurisdiction of the cause.

Counsel for plaintiff in error seek to maintain the proposition that this court has jurisdiction of the cause by submitting for consideration two propositions:

First: "It appears that there was a denial by the State Supreme Court of authority exercised under the United States, in that such court refused to consider, and thereby in effect, decided against the title and right of plaintiff in error specially set up and claimed under such authority, or to be more direct, that the

court refused to consider and by so doing, decided against the title and right of the plaintiff in error to the free and unincumbered use of that part of its right of way and railroad over which it is claimed Calvert Street exists, its title and right to said right of way and railroad having been acquired under and by force of judgment and decree of the Circuit Court of the United States al. as specially set up and claimed.

Second: The return of the railway company to the alternative writ of mandate, after averring the facts stated as ground for the assertion that this court has jurisdiction, makes the direct and positive allegation of the existence of a federal right in the following words: 'And this defendant says that in this action it is sought to appropriate its property acquired by virtue of the decree aforesaid rendered in the Circuit Court of the United States, for the district of Indiana, without due process of law, and without compensation, in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant now claims immunity under said Fourteenth Amendment from having its property taken from it by means of this action, without compensation and without due process of law."

A conclusive answer to each of the foregoing propositions, submitted as ground for the assertion of jurisdiction in this case is, that the allegations of the return to the alternative writ of mandate did not properly present either question to the trial court or to the Supreme Court of the State of Indiana.

The issue tendered upon the filing of the demurrer by defendant in error to the return, was the validity of the contract set up. We might admit for the purpose of this branch of the argument that if the alleged facts, showing an attempt on the part of defendant in error to take the property of the plaintiff in error, in violation of the judgment of the United States court for the district of Indiana or contrary to the immunity afforded by the federal constitution, had been properly and sufficiently al-

leged, then a federal question would be involved and jurisdiction of this court would attach, but it is patent that the return to the writ is not drawn so as to present either question; hence this court is without jurisdiction. Whether it presents either question is, of course, dependent upon the construction of the pleading. The Supreme Court of the State of Indiana has held that the pleading did not present either question and we maintain that this construction of the state court is binding upon this court, unless it is palpable that the state court so construed the pleading for the purpose of evading the federal question thereby divesting this court of jurisdiction on writ of error; but we submit that the history of the case and the reasons assigned by the state court in its opinion, conclusively show that the construction of the pleading so as to exclude consideration of the federal question, was made in good faith and in consonance with the allegation of the pleading considered as a whole, and was required because of the failure of the pleader to base his defense properly upon the federal question. From the time of the filing of the demurrer in the trial court, the defendant in error maintained that the pleading made the validity of the contract the issue to be determined, and that no federal question was presented for decision. On appeal in the Supreme Court of the State, the defendant in error submitted the following as a part of its argument:

"Counsel say that the validity of the contract pleaded is not the only question presented by the record. Appellant maintains that if the contract is void, still the city cannot recover because the real estate constituting the intersection of Elmira Street and the railroad was never legally condemned for want of notice, and, therefore, the intersection is still a part of appellant's right of way free of any easement in the public. We insist that this is not the theory of the return and answer. Manifestly,

appellant recited all the facts with reference to want of notice to show the good faith of the railroad in its opposition to the opening of the street and to show that a real controversy existed; that thereupon, and in settlement thereof, the contract pleaded was executed. A party is permitted, if he desires, to plead denial specially. But when he files a long and involved pleading, the theory of which is an affirmative defense, he will not, on appeal, be permitted to forsake that theory and base his defense upon some isolated facts, which, pleaded on the theory of a special denial, might have been a complete defense. We ask, if the theory on which appellant proceeded when it filed its pleading below was that of denial only, thereby raising the issue of the legal existence of the highway, why did it not file the ordinary general denial; if counsel reply that appellant had the right, as a matter of practice, to plead specially the facts showing the non-existence of the street, then we inquire, why did it load the pleading down with facts showing compromise and settlement of the controversy between the parties by the execution of the contract pleaded? The contract, on the theory of the pleading being a special denial, is totally immaterial. The truth is all the facts alleged could have been embodied and were embodied in the pleading on one theory alone, and that was the contract growing out of the facts and circumstances alleged was a conclusive and legal reason why a peremptory writ of mandate should not issue. In Platters vs. City of Seymour, (83 Ind. 323-6), supra, the court says:

"'A pleading is to be considered according to its general scope and is not to be controlled by detached and isolated statements. To permit an isolated statement to control the scope and meaning of a long and involved pleading would be destructive of all certainty in pleading, result in injury to litigants and impose upon the trial court the burden of looking into out-of-the-way places to discover if disconnected and irrelevant allegations existed which might change the drift of the general averments of the complaint (or answer). Such a system would make pleadings a mere trap for the ensnaring of the adverse

parties and would give to pleadings a protean character which all rules of practice condemn.' "

" This court in Copeland Executor v. Summers et al, supra and other cases heretofore cited, hold that an answer must proceed upon some definite theory, and if bad upon that theory, it cannot be sustained upon some other theory, hence, in this case, the return and answer proceeding upon the theory that the contract was an affirmative defense, isolated statements possibly amounting to a negative defense, either a special or general denial, cannot now be invoked. Counsel assert that when a special denial is filed without a general denial, the former is sufficient if it contain a denial of some of the material facts in the verified complaint and alternative writ. We may grant this, if the theory of the answer is a negative defense for then the pleading is good upon the theory adopted, but that does not permit the pleader to lift some isolated statement out of his pleadings, setting up an affirmative defense, rely upon those statements and thereby change the theory of the pleading from an affirmative to a negative defense. Where a pleader unnecessarily set up facts, specially, admissable under a general denial, the theory he proceeds upon remains the same, a negative defense, and if the pleading is good in any view as a negative defense, it may be sufficient. This is consistent with reasonable certainty in pleading and that is as far as the authorities cited by the appellant go. But if a pleading proceeds upon the theory that the facts considered as a whole constitute an affirmative defense, and incidentially some facts admissable under the general denial are pleaded, the pleading must be good as an affirmative defense. The facts so incidentially pleaded can not be invoked as a defense. "

"A pleading cannot be made elastic so as to take form with the varying view of counsel." Miscall v. Tully et al, supra.

"When, as here, the controlling theory upon which the pleading proceeds is that there is a contract absolving from liability, it must be good on that theory, or it will not be good at all. A pleading assuming to proceed on a definite theory cannot be made good on some other by casting into it isolated and subsidiary statements which, if fully pleaded, in a separate paragraph, might constitute a defense." Western Union Telegraph Co., v. Young et al., supra.

"Every presumption is in favor of the ruling of the lower court, and if there is doubt as to the theory of the answer and return, that theory should be adopted by this court, which would sustain, not reverse the judgment. For it is not reasonable to assume that appellant's counsel—particularly able counsel in this case—did not know how to draw such a pleading as the law requires, that is, upon some definite theory; nor would we even suggest that counsel deliberately drew a shuttle-cock pleading—affirmative defense below—negative defense above; and it is also not reasonable to assume that the court below, in view of the mongrel character of the answer and return, did not look, not only to the general scope of the pleading, but to the position of counsel for appellant in that court. Force and effect can be given to all the allegations in the answer and return on one theory alone, and that theory is, that the claimed want of notice to appellant and to the mortgagee lead to a bona fide controversy as to the legal existence of the highway, as against appellant, and, in settlement of that controversy, the contract alleged was executed, which contract absolves appellant from opening up and maintaining the crossing at grade. And, upon that theory, we submit, the answer and return is wholly insufficient, because the contract is ultra vires and absolutely void."

The contention of Counsel for defendant in error so made before the Supreme Court of the State of Indiana was sustained in the opinion rendered in the cause, as appears from the following excerpt (See record page 31).

"Appellee's counsel insist that the only question presented to and considered by the circuit court upon the demurrer to the return was the validity of the agreement therein pleaded."

"Appeals are provided primarily to enable parties to secure a review of the decisions made by trial courts and generally speaking, upon appeals, parties will be held to the position and theory assumed and maintained by them in the court below. In the preparation of issues for trial, it is necessary to require parties to adopt and make their pleadings conform to some definite theory. When a pleading has been framed upon a manisfestly definite theory, it must be good upon that theory, or it will not be good at all. A pleading must be judged from its general tenor and scope, and, when it assumes to proceed upon a distinct theory, it cannot be made good upon some other by casting into it isolated statements, which if fully pleaded in separate paragraphs might constitute a cause of action or defense. Western Union Telegraph Co. v. Young, 93 Ind., 118; Western Union etc. Co. v. Reed, 96 Ind., 195 (198); Balue v. Taylor et al, 136 Ind, 368; 21 Ency. Plead & Prac. 652.

"The manifest theory of the pleader was to show that a reasonable and bona fide controversy existed as to the validity of the proceedings for the establishment of Elmira Street by the Board of Trustees of the Town of Myler, as an inducement to and consideration for entering into the compromise agreement pleaded, and that said contract having been legally executed and not rescinded, the Railway Company was thereby absolved from the duty declared upon, to construct and maintain a grade crossing at the point in controversy. 'A single paragraph of answer cannot perform the double function of denying the cause of action and confessing and avoiding it. It must be one thing

or the other, but it cannot be both; and its character, in this respect must be determined from the general scope of its averments.' Kimble v. Christie, 55 Ind., 140 (144). In our opinion the return under consideration was intended to confess and avoid the duty sought to be enforced and its sufficiency must be determined upon that theory. This conclusion forbids the discussion of the legality of the various steps taken in the proceedings to establish Elmira Street as well as the constitutional question raised."

Is this construction of the pleading by the state court and its judgment thereon subject of review here?

This court, in Murdock v. City of Memphis, 20 Wallace, 634, holds, it is essential to the jurisdiction of this court over the judgment of a state court that it shall appear that:

1. One of the questions mentioned in the Act must have been raised and presented to the state court.

2. That it must have been decided by the state court or that its decision was necessary to the judgment or decree rendered in the case.

3. That the decision must have been against the right claimed or asserted by the plaintiff in error under the constitution, treaties, laws or authority of the United States.

4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

5. If it finds that it was rightly decided, the judgment must be affirmed.

6. If it was erroneously decided against the plaintiff in error, then this court must further inquire whether there is any other matter or issue adjudged by the State Court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiry into the soundness of the decision of such other matter in issue.

7. But, if it be found that the issue raised by the question of federal law is of such a controlling character that its correct decision is necessary to any final judgment in the case, or that there is no decision by the State Court of any other matter or issue which is sufficient to maintain the judgment of that court without regarding the federal question, then this court will reverse the judgment of the state court, and will either render such judgment here as the state court should have rendered or remand the case to that court as the circumstances of the case may require.

Sayward v. Denny 158 U. S. 184.
De Lamars Nevada G. M. Co. v. Nesbit, 177 U. S. 523 s. c. 20 Sup. Ct. Rep. 775 (777).

In California Powder Works v. Davis et al, 151 U. S. 381 s. c. 14 Sup. Ct. Rep. 351, the Court says:

"It is axiomatic that in order to give this court jurisdiction on writ of error to the highest court of a state or where a decision in the suit could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court having jurisdiction, but that its decision was necessary to the determination of the case and that it was actually decided or that the judgment as rendered could not have been

given without deciding it. And where the decision complained of rests upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented.

"It is equally well settled that where jurisdiction depends upon the denial by a state court of a title, right, privilege or immunity claimed under the Constitution or any treaty or Statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed."

The foregoing decisions lay down the general rules by which this court determines its jurisdiction on writ of error.

It is patent in this case the decision of the state court was placed upon an independent ground not involving in any way a federal question and that ground is sufficient to sustain the judgment. The federal question, if any, lay behind the determination of the question of the character and theory of the pleading. This was the first question for determination by the court. If the court construed the pleading according to its established rules of construction, it is apparent such construction was made in good faith, and plaintiff in error could not complain because by such construction the real issue was held to be the validity of the contract and not the federal question now asserted.

In order to hold that the federal question was presented, the supreme court of the state would have to ignore the long and unbroken line of decisions laying down the rule of construction of pleadings. The only question for this court to deter-

mine is whether the construction of the pleading, and the local question—the validity of the contract—were the real grounds for the decision. If this court answer that inquiry in the affirmative, then it is without jurisdiction.

In Chapman v. Crane, Administrator, 123 U. S. 540, s. c. 8 Sup. Ct. Rep. 211, the court in passing upon the question as to whether a party had been properly admitted to suit, and whether the state of facts showed a new cause of action under the local law, said:

"Whether this was the true legal effect of what was done is not a federal question. All we have to consider is whether it was the real ground of decision and not used to give color only to a refusal to allow the bar of the decree in a former suit. * * * * * * Nor can we consider whether the court below erred in allowing the county to come in as a party to the suit, and in giving judgment upon a new cause of action which arose after the original suit was begun. The question presented by the pleadings was a real question in the case as judged by the court and the manner of getting it in is no more the subject of review here than the decision upon it afterwards. We are aware the right of immunity set up and claimed under the constitution and under the laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejected the claim but avoided all reference to it, is as much against the right within the meaning of Section 709, Revised Statutes as if it had been specially referred to and the right directly refused. But, if a decision of such a question is rendered unnecessary by the view which the court properly takes of the rest of the case within the scope of the pleadings, the judgment is not open to review here."

In Brooks vs. State of Missouri, 124 U. S. 394, s. c. 8 Sup. Ct. Rep. 443, the court held the Statutes of the State of Missouri, providing that a motion for a new trial must be filed before judgment and within four days after the rendering of the verdict, did not contravene the Fourteenth Amendment to the Constitution, and that the independent ground upon which the decision was based by the supreme court of Missouri was fairly presented and necessarily involved in the case and by placing the decision upon such independent ground it properly disposed of the supposed constitutional question without a direct decision and such a ground being real—not evasive—the decision was not reviewable here.

In Johnson vs. Risk, 137 U. S. 300 (307) s. c. 11 Supt. Ct. Rep. 111, the records show that in the supreme court of Tennessee two grounds of defense have been urged, one of which involved a provision of the federal bankruptcy act and the other the bar of the Statute of limitations of the State of Tennessee. The court held:

"Where there is a federal question but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then, if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because when put to inference as to what point the state court decided, we ought not to assume that it proceeded on a ground clearly untenable. But, where the defense is distinctly made resting on local statutes, we should not, in order to reach the federal question, resort to critical conjecture as to the action of the court in the disposition of such defense. Was the defense of the statute of limitations so palpably unfounded that we must presume that the state court overruled it? * * * * * * * * * Inasmuch, therefore, as if the Supreme Court of the

State had sustained the defense of the statute of limitations, we cannot perceive that such a decision would have been erroneous, it does not appear that the judgment, as rendered, could not have been given without deciding the federal question, or that its decision was necessary to the determination of the cause, and that it was actually decided. The writ of error must therefore be dismissed.''

From the foregoing citations it clearly appears that where the decision is based upon an independent ground not involving a federal question and this is done in good faith, and not for the purpose of evading the federal question, the decision of the highest court of the state is binding upon this court. We might admit that if it appeared that the supreme court of the State of Indiana rested its decision upon the question of pleading and ultimately upon the validity of the contract for the manifest purpose of avoiding the decision upon the federal question, then, notwithstanding such decision, this court might assume jurisdiction and pass upon such questions as it found properly presented by the pleadings, federal in character; but the record of this case clearly precludes the assumption of jurisdiction for such reason.

Whether the construction of the pleading as made by the state supreme court, or its finding upon the validity of the contract, were sound or not, is not for inquiry here. The basis of the decision is broad enough in itself to support the final judgment without reference to the alleged federal question. Beaupre v. Noyes 158 U. S. 397 (401) s. c. 11 Sup. Ct. Rep. 296; also Klinger v. Missouri, 13 Wallace 257 (263).

All causes of action originating in the state courts and in the inferior federal courts are, and necessarily must be, subject to the rules of pleading obtaining in the particular jurisdiction, and it is for the state court to say whether the particular defense has been sufficiently alleged as measured by the rules applicable to the pleading obtaining in the state.

If the defense is founded upon a federal question it must have been presented, not only in the supreme court of the state, but before the trial court. Chappel v. Bradshaw 128 U. S. 132, s. c. 9 Sup. Ct. Rep. 40.

All allegations in the pleading which go beyond the statement of a good defense upon the theory adopted is mere surplusage and when the statement of the defense, tested by the rules of good pleading do not disclose that a federal question is involved, the federal court has no jurisdiction. City of Fergus Falls v. Fergus Falls Water Co. 72 Fed. Rep. 873.

The gravamen of the pleading, the return to the alternative writ was the validity of the contract. The pleader failed to properly set up sufficient facts to bring plaintiff in error within the protection of the constitution and the legal effect is the same as if he had failed to set up any facts with reference to the constitutional question. There is no federal question raised when the facts are insufficient to present such question as the issue to the court for judicial determination. De Lamars Nevada G. M. Co. v. Nesbit, supra.

Counsel for plaintiff in error cannot successfully assert that immunity is denied under the Fourteenth Amendment of the Constitution by the decision of the state court, when by the

pleading the protection of such constitutional provision was not successfully invoked by failure of the pleader to present facts bringing plaintiff in error within its purview. If the defense existed but was not properly presented it was not denied. Louisville & Nashville R. R. Co. v. Smith, 177 U. S. 232 s. c. 20 Sup. Ct. Rep. 620 (625)

This court in Oxey Stave Co. v. Butler County, Missouri, 166 U. S. 649, s. c. 17 Sup. Ct. Rep. 709, in interpreting the provision of Section 709 of the revised statutes which required that the right, title, privilege or immunity shall be specially set up and claimed, says (711):

"The word 'specially set up and claimed' implies that if a party intends to invoke for protection of his right the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare and unless he so declare specially (that is unmistakably) this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met, if such declaration is so general in character that the purpose of the party to assert a federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentively from the facts stated. Hence, the averment that a party resides in a particular state does not import that he is a citizen of that state. Upon like grounds, the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference but only from averment so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right * * * * * * * * * * * (713). If it appears that the Supreme Court of a state regarded this general allegation as asserting such federal right or immunity and denied the claim

so asserted, our jurisdiction could be sustained, but it does not so appear. We are of opinion that this court is without jurisdiction to review the final judgment of the Supreme Court of Missouri."

The foregoing excerpt recognizes the binding force of the construction placed upon a pleading by the supreme court of the state. The state court in the case at bar elected to hold that the allegations in the return were not sufficient to present the federal question. This forecloses jurisdiction attaching in this court. If the state court had held the allegations sufficient to present the federal question and then denied the right asserted, jurisdiction would attach, but the right is not denied when, tested by the rules of pleading obtaining in the state of Indiana, sufficient facts are not alleged to raise the constitutional question.

As a general proposition, if the supreme court of the state has acted in consonance with the constitution and laws of the state and of its own procedure, this court will not interfere on the ground that there has been a denial of a constitutional right. Hovey v. Elliott 167 U. S. 409, 17 Sup. Ct. Rep 841 (854)

Our position that the construction placed upon the pleading by the state court is conclusive and that the federal question, if any, lay behind the construction of the pleading and the independent ground upon which the decision was ultimately placed, is sustained by Chouteau et al. v. Gibson, 111 U. S. 200, 4 Sup. Ct. Rep. 340. We quote:

"From the beginning it has been held that to give us jurisdiction in this class of cases, it must affirmatively appear on the face of the record not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided or that its decision was necessary to the judgment or decree in the case * * * * * * * * * * * * *

It is conceded that the state supreme court in deciding this case sustained this defense, (former adjudication) and rendered the decree now here for review in favor of Gibson, on that ground alone without considering any of the other questions involved. Such being the case, it is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here. The federal question, if any there were in the case, lay behind this defense and could not be reached until it was out of the way. The question presented by the defense was not whether a federal right had been properly denied by a former judgment but whether the right had been once judicially determined so as to become res adjudicata as between the parties; whether an equitable title could be set up in bar of the action at law brought by Gibson, the holder of the legal title to recover possession, is a question of state law upon which the judgment of the state court is conclusive. *The same is true of the question whether the pleadings and the former action were such as to present an equitable defense in proper form, for final adjudication.* The court below has decided that the pleadings were sufficient; that the equitable defense could be made, and that the judgment in that action, in favor of Gibson, was, in its legal effect a judgment that Chouteau and Maffit have no title to the land in controversy. * * * * * * * * * * * * * * *
It is apparent, therefore, that no federal question which there may have been in the case was decided by the state court, and that the decision of such a question was not necessary to the final decree rendered."

Where estoppel is the independent ground upon which the state court bases its decision, such ground is sufficient to sustain the judgment in this court, notwithstanding a federal question may have been presented. Adams Co. v. Burlington & M. R. R. Co. 5 Sup. Ct. Rep. 77 (80).

In the Texas Pacific Railway Co. v. Southern Railway Co. 137, U. S. 48, s. c. 11 Sup. Ct. Rep. 11, this court held that it was bound by the finding of the state supreme court that certain clauses in a contract between the parties had not be adjudicated upon in a former action, and that such finding was not a basis for plaintiff in error to assert that a federal question was involved.

In Speed, Admr. v. McCarthy, 181 U. S., 613, 21 Sup. Ct. Rep. 613, the plaintiff in error had, in the court below, made some general allegations in a pleading purporting to assert a right given and protected by an Act of Congress with reference to a mining location. The state court, however, disposed of the case upon an independent question, not federal in character, to which it applied the general principles of law of the local jurisdiction, and this court held that the facts with reference to the federal question not being specially asserted, the state court did not deny a right or title secured by the Constitution when it determined a local question on general principles of the laws as recognized and prevailing in the local jurisdiction; in other words, there was the same deficiency in the pleadings that we have pointed out in the case at bar.

In Union Pacific Railway Company v. Pain, 119 U. S., 561, s. c. 7 Sup. Ct. Rep., 323 (325) this court holds that the construction of a pleading obtaining in the state court of Minnesota on appeal controlled both the Circuit and the Supreme Courts of the United States.

In Sayward v. Denny, 158 U. S., 180, 13 Sup. Ct. Rep. 777, it is held that a defense on an issue as to possession of a right must be distinctly deducible from the record, before the state

court can be held to have disposed of a federal question by its decision and that the federal question was relied upon before the local court; that the decision must have been against the right claimed and that the federal question was so directly involved that the state court could not have rendered the judgment without deciding it. It is patent in the case at bar that a federal question was not involved directly and that the allegations now relied on as an assertion of the right claimed were only preliminary to the main question which constituted the real issue of the pleading, the validity of the contract, a distinctly local question.

In Iowa Central Railroad Company v. State of Iowa, 160 U. S., 389, s. c. 16 Sup. Ct. Rep., 344, the court holds that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided the method of procedure adopted for this purpose gives notice and affords fair opportunity to be heard before the issues are decided, and that the question whether the highest state court erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of plaintiff, is not reviewable on appeal to the supreme court. We respectfully direct the attention of this court to the fact that the decisions relied upon by the plaintiff in error as warranting the assumption of authority by this court in this case are cases wherein the right obtaining under a judgment of a federal court or the constitution had been admittedly presented by the pleadings and had been denied by the highest court of a state, or where a federal question had been

indisputably presented by the pleading and decision thereon evaded by the state court.

We have only been able to make a hasty examination of the authorities cited by counsel, but are unable to find any case cited directly in point on this appeal, and holding, as the court must hold, to assert jurisdiction herein, that where the highest court of a state has held in good faith and in consonance with the rules of construction applicable to a pleading in its jurisdiction, that a federal question is not presented by the pleading, nevertheless jurisdiction obtains in this court.

It is true that in Mitchell v. Clark, 10 U. S., 633 (645), 4 Sup. Ct. Rep. 170 (176), the excerpt as given in the brief of the plaintiff in error might be held to lend some support to counsel's contention, but an examination of the case will reveal that other grounds than the sufficiency or insufficiency of a pleading were relied upon for the assumption of authority, particularly the fact that the manner of pleading in defense had been made a question of federal law by a provision of a federal statute, and also that the Supreme Court of Missouri did not directly hold that the pleading was insufficient.

Chicago, Burlington & Quincy Railroad Company v. Ills., ex rel. etc., 200 U. S. 561, 26 Sup. Ct. Rep. 341 (344) is quoted at length as sustaining counsel's position that the sufficiency of the pleading to present a federal question is not to be determined conclusively by a state court but is subject of review by this court.

An examination will disclose that the question presented to this court in that case was not the sufficiency of the pleading to present a federal question, but rather the duty of a state

court to pass upon a federal question after it had been properly raised. In that case, the question was directly in issue for the reason that the federal question had been asserted by special demurrer filed by the plaintiff in error and no question of construction of a pleading by the state court was involved.

Finally, we further contend that, if the question of the sufficiency of the pleading should be held to be subject of review by this court, the reasons assigned by the state court for holding the pleading insufficient to present federal questions are sufficient, treating the matter as an original question here, to impel the same finding by this court.

As the alleged federal questions were not properly presented to the trial court or on appeal to the Supreme Court of the State, according to the decision of the Supreme Court of the State of Indiana, and, as it affirmatively appears that the Supreme Court acted in good faith in holding that no federal question was presented, and that the decision on the merits was placed upon an independent question of local character sufficient to sustain the judgment, and as it further affirmatively appears that no right, title, privilege, interest or immunity vested in the plaintiff in error under the Constitution of the United States or under the authority exercised under the United States was denied by such decision, we respectfully ask that under the established practice of this court, the writ of error be dismissed for want of jurisdiction.

The Merits.

II.

So firmly convinced are we that jurisdiction does not attach in this case under the state of the record, we shall only in a cursory way consider the alleged federal questions. On the assumption that the merits may be passed upon by this court, we submit the following points and authorities:

POINTS AND AUTHORITIES.

1. The law makes the opening of streets and alleys in cities and towns in some measure a summary proceeding made in behalf of the general welfare of the inhabitants; and if there is a substantial compliance with the requirements of the statute, made in good faith, the proceedings will not be held void.

Graves et al vs. Town of Middleton et al
137 Ind. 400.

2. This defense being a collateral attack upon an order of the Board of Trustees made in a matter presumptively within their jurisdiction must fail unless the proceedings are so defective as to be void.

Ryder by next friend v. Horstling et al
130 Ind. 104.

3. The assumption of jurisdiction and the entering of a decree or judgment is an adjudication upon the question of notice without any formal or express declaration to that effect. When the court adjudged that notice had been given this implies notice to all the proper parties, until the contrary is shown, even in cases where the finding on jurisdictional question may be collaterally attacked. Every presumption is in favor of the

jurisdiction of the court. The record is prima facie evidence of it and will be held conclusive until clearly and explicitly disproved.

Jackson v. State, for use, Dyar
Drainage Commissioner 104 Ind. 516-520.

4. The answer does not allege that no notice was given an "agent," therefore, in this, a collateral attack it will be presumed that notice was given an agent.

Ryder by next friend v. Horstling et al supra.

5. Admitting that some notice is required in highway proceedings, it is competent for the Legislature to prescribe the kind of notice. The proceedings is a proceeding in rem and notice may be either personal or constructive.

Elliott, Roads and Streets, Sec. 199.
The Indianapolis, etc. Co. v. the State ex rel.
105 Ind. 37.
McEneney et al v. the Town of Sullivan
125 Ind. 407.

6. Notice to "the owner or agent" of land affected by highway proceedings is sufficient.

Burns R. S. 1901, Sec. 4405.
Porter v. Stout 73 Ind. 3.
Rider by next friend v. Horstling et al Supra.

7. If a notice to a mortgagee were necessary in highway proceedings, it still would be incumbent on the mortgagee to show that there was not sufficient property left out of which to make the mortgage debt. Without such showing, the proceedings are not subject to collateral attack.

Smith v. Detroit—120 Mich. 572, s. c. 79 N. W. 808
Cyc. Vol. 15, P. 839.

8. The answer does not negative the fact that service of notice was had upon the predecessors in title, and the return thereof made in the "popular name" of the then "owner or agent." Such service and return is legally sufficient and must be negatived in this, a collateral attack.

Bloomfield R. R. Co. v. Burress 82 Ind. 83-85.

9. In a collateral attack on highway proceedings one interested person cannot take advantage of failure to give notice to another..

Ency. of Law (1st. Ed.) Vol 24 P. 22
State v Richmond 26 N. H. 235.
Nichols vs. Salem 14 Gray (Mass) 490.

10. In this, a collateral attack, on highways proceedings, to succeed, it is necessary, in order to overcome the presumption that the proceedings were regular and binding on all parties, to negative any proceeding by which the appellant might have been served with notice. Under the statute of Indiana, Burns R. S. 1901, Sec. 4405, "if the owners are unknown or non-residents" notice shall be given by publication or posting. The board may well have found that the predecessors of plaintiff in error were unknown, and have notified them by publication or posting. The proceedings are not void if some notice was given though not a compliance with the statutory requirements.

Graves et al v. Town of Middletown
et al supra, P. 402.
Caskey v. City of Greensburg et al
78 Ind. 233-238.

11. When the public asserts the right in property as a public highway, every presumption is in favor of the existence of the highway and in a collateral attack upon its legal existence

to succeed, it must be clearly and affirmatively shown that the highway was not established by condemnation, dedication, prescription, grant or other manner known to the law.

Faust v. the City of Huntington et al
91 Ind. 495.

12. This being a collateral attack, if the record discloses nothing upon the point, jurisdiction over the railroad company will be presumed.

Bloomfield, etc. R. R. Co. v. Burress
82 Ind. 83-86.

13. Where an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon cannot be collaterally attacked.

Porter v. Stout, supra.
Ricketts et al v. Spraker et al 77 Ind. 374.
Adams et al v. Harrington et al 114 Ind. 71.

14. The allegations in the answer and return that "it (the predecessor in title of plaintiff in error) was not and did not become a party to said proceedings in any manner, whatsoever," is simply an opinion—a mere conclusion or deduction from facts not pleaded, hence cannot be considered when marshaling the facts relied on to overcome the legal presumption of the validity of the highway proceedings, and to establish the absolute invalidity of the proceedings.

Indianapolis, etc. R. R. Co. v The
State ex rel. City of Lawrenceburg, supra P. 498.
Caskey vs. City of Greensburg et al 78 Ind. 233-237.

15. The following is a copy of the Statute of Indiana under which Elmira Street was established, same being Sec. 4405, Burns Revised Statutes of Indiana, 1901:

"When, upon petition signed by twelve freeholders, residents of any town, the board of trustees of such town may be of the opinion that public convenience requires the opening of a new street or alley, or widening or narrowing of a street or alley already opened, the board of trustees shall appoint three commissioners, residents of said town, who shall be disinterested freeholders, to appraise and assess the damages and benefits accruing to the owner of any land or lot through which any street or alley is proposed to be constructed or altered, or any building or structure thereon appropriated, as provided in the preceding section. Such commissioners shall, before they proceed to perform their duties as said appraisers, take and subscribe an oath or affirmation faithfully to perform their duties as such appraisers; which shall be indorsed upon or attached to their appointment, and filed with the clerk of the board. Twenty days notice shall be given such commissioners by the board of trustees, through the town clerk, of the appraisement to be made, giving a complete description of the premises to be viewed. A like notice shall be given by personal service, or by leaving the same with some person of suitable age at their reputed place of abode, to each of the *owners or agents* of lots or lands upon or through which the public improvement or street or alley is proposed to be made. If the owners are unknown or non-residents, publication of the same in one or more newspapers of the town, or by posting up written notices in six public places in the town (if there be no newspaper published therein), for three weeks, shall be deemed equivalent to such personal service."

16. Courts will take judicial knowledge that a railroad belongs to a certain system and is popularly known by a certain name, which name may not be its true corporate name.

Cyclopedia of Law, Vol. 16, p. 861.
Pacific R. R. Co. v. Graves 2, Texas Appeal Civ. Cas. 676.
Ryan v. Baltimore & O. R. R. Co., 60 Ill. App. 615
Bloomfield R. R. Co. v. Burriss, 82 Ind. 83
See also Alsup v. State, 36 Tex. Crim. 535.
s. c. 51 Am. Rep. 768.

17. Courts may resort to any means of informing themselves as to the matters of fact that are sufficiently notorious to be the subject of judicial cognizance.

Cyclopedia of Law, Vol. 16, p. 921.

18. The Vandalia Railroad Company first appeared in this case by an assignment of errors in the Supreme Court of the State of Indiana (See Record Page 24.) In the assignment it is averred that the Vandalia Railway Company, the Terre Haute & Logansport Company and various other corporations, all created and organized under the laws of the State of Indiana, have been consolidated into a railroad corporation organized under the laws of the State of Indiana, and known as the Vandalia Railway Company. The consolidation acts in force at the time of the consolidation alleged are set forth in Burns Revised Statutes of Indiana, 1901, and read as follows:

Sec. 5251. "Whenever two or more railroad companies have heretofore become associated, or shall hereafter become associated, in jointly making or running their roads under any contracts formed or to be formed, by such companies, and desires to assume one common name, it shall and may be lawful for such companies by resolution of their respective boards of directors

entered upon their records, to adopt such name as shall be agreed upon.

Sec. 5252. "It shall be the duty of said companies upon the adoption of such common name, to cause a copy of the resolution of such boards to be recorded in the recorder's offices of the different counties through which the road of said companies may run or be located; and, thereafter, during the term of such association, such companies may have and use a common seal, contract and be contracted with, sue, and be sued by such adopted name, in any and all matters relating to such union road; and shall have full power, by such association, to locate, construct, keep up, change, repair, and operate such union road, as, by their respective charters and amendments to such charters, they are allowed to do. PROVIDED, HOWEVER, That nothing herein contained shall be construed to abridge such companies of any of the powers and franchises belonging to them by their respective acts of incorporation and amendments to such acts; and, Provided, further, That nothing herein contained shall be construed to prevent said companies from suing and being sued in their original corporate names, for all rights accrued and all liabilities incurred before the adoption of such common name."

Sec. 5253.—1. Any railroad company organized and incorporated under the general laws of this state for the purpose of building a railroad from any point in the state to a point on the state line, shall be authorized to connect with any other railroad already made from such point on the state line at any convenient point of intersection within this state.

Sec. 5254.—2. Such connection may be made by agreement between the respective companies, under and in accordance with the provisions of, and with all the rights, powers and privileges granted by an act entitled "An act to authorize two or more railroad companies to assume a common name, and to sue and be sued, contract and be contracted with, and prosecute their business under such common name," approved January 25, 1853.

Sec. 5255.—3. Any such railroad company so connecting with the road of another company shall not be required to complete its own road to the state line so long as it shall continue to be thus associated with the company owning such other road already built from the state line, but its franchise and powers to build and complete its own road to the terminal point on the state line, whenever it shall be necessary so to do, shall remain unimpaired: Provided, That a consolidation, either temporary or permanent, effected under the first section of this act with any railroad company whose bridges, or any of them, may be jointly used or occupied, or where a right, by law, exists to use and occupy by any other company, shall not in any manner affect the rights therein vested or secured by any act heretofore passed upon that subject.

Sec. 5256.—4. Any railroad company organized as in the first section of this act mentioned, and completing its connection with its terminal point on the state line by connection with the railroad of another company, as authorized by this act shall be taken and deemed to be a company owning and constructing a road to the state line, and shall possess all the rights, franchises, and privileges, and be subject to all the obligations and duties, of a railroad company owning a road to the state line, as prescribed by any general law of this state, not inconsistent with the provisions of this act.

Sec. 5257.—1. Any steam or electric railroad heretofore organized under the laws of this state shall have the power to intersect, join and unite its railroad with any other steam or electric railroad, constructed or in progress of construction, in this state or in any adjoining state, at such point on the state line, or any other point, as may be mutually agreed upon by such companies; and said companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company or the two steam or electric roads thus connected, upon such terms as may be by them mutually agreed upon in accordance with the laws of the adjoining state with

whose road or roads connection are thus formed: Provided, Their charters authorize said roads to go to the state line or to other point of intersection.

Sec. 5258.—1. That when any railroad company formed by the consolidation of a company or companies of this state with a company or companies of another state or states, shall make a further consolidation with a company or companies of another state or states owning a continuous and connected but not competing line, the constituent companies shall have power to fix by the agreement for such consolidation the terms and conditions upon which the same shall be made, which terms and conditions may include the payment or retirement of the preferred stock of either or both of the constituent companies, if they have such; and in case the new companies shall issue preferred stock, the par value of the shares thereof may be fixed by the agreement of consolidation, or by the resolution for the issue thereof without regard to the par value of shares of the common stock of such company.

Sec. 5259.—2. Any railroad company heretofore organized or which may hereafter be organized under the general or special laws of this state for the purpose of constructing a railroad from any point within this state to the boundary line thereof is hereby empowered to extend said railroad into or through any other state or states, under such regulations as may be prescribed by the laws of such state or states into or through which said road may be so extended; and the rights and privileges of said company over said extension, in the construction and use of said railroad for the benefit of such company and in controlling and applying the assets of such company, shall be the same as if its railroad had been constructed wholly within this state.

Sec. 5260.—3. Any railroad company heretofore organized or which may hereafter be organized under the general or special laws of this state, and which may have constructed or commenced the construction of its road so as to meet and connect with any other railroad in an adjoining state at the boundary

of this state, shall have the power to make such contracts and agreements with any such road constructed in an adjoining state for the transportation of freight and passengers or for the use of its said road, as to the board of directors may seem proper.

Sec. 5261.—4. No railroad company incorporated or organized by special charter or under a general law shall incur a forfeiture of any of its corporate privileges by reason of its having heretofore failed to elect directors within the time prescribed by its charter or said law, or on account of a misnomer of said company in any publication of notice, or for a failure to complete the work within the designated period; but all said companies, so incorporated as aforesaid, shall have full power and lawful authority to construct and complete, within five years herefrom, their roads over the routes which they may have hitherto respectively surveyed and located; and whenever any railroad company shall have surveyed and located a route for a road, and commenced the construction of the same, it shall have full right and authority to complete said road, and to use and occupy the same: Provided, That nothing herein contained shall be construed to extend to any companies under special charters, except such as are now organized and have actually constructed some portion of their railroads.

Sec. 5262.—1. The provisions of the first section of the act above recited were intended to apply to railroads hereafter organized as well as to those heretofore organized; and it shall and may be lawful for railroad companies hereafter organized under the laws of this or any adjoining state, as well as those heretofore organized, to consolidate and make their stock joint-stock with any other railroad company heretofore or hereafter organized as aforesaid, on the terms and conditions and subject to all the restrictions as stated in said act.

19. Under the decision of the Supreme Court of the State of Indiana, the new company succeeds to all the rights and be-

comes subject to all the liabilities of the companies from which it is formed.

City Railroad Company v. Jones, 29 Ind. 465.
Payne v. Railroad Company, 31 Ind. 283.
Railway Company v. Powell, 40 Ind, 37.
Railway Company v. Hendricks, 41 Ind. 48.
Railway Company v. Boney, 117 Ind. 501.
Scott v. Handshear, 94 Ind. 1.
Cashman et al v. Brownlee, 128, Ind. 266.
Jusson v. Board of Commissioners, 95 Ind. 567.
Railway Company v. Galey, 141 Ind. 360.
Midland Ry. Co. v. Galey, 141 Ind. 483.
Eaton Co. v. Hunt, 20 Ind. 457.

Argument on the Merits.

For the purpose of argument on the merits, let us assume that the sufficiency of the allegations of the return of plaintiff in error as a defense, is proper subject of inquiry in this court. Such defense is a collateral attack upon the highway proceedings. When the Board of Trustees of the town of Myler assumed jurisdiction and entered its finding under the highway proceedings, it adjudicated the question of notice. This is conclusive against all persons until it is shown clearly and explicitely that binding notice was not given.

Any method of giving notice laid down by the legislature of Indiana may be followed, and in order to invalidate proceedings, it must be shown that no method known to the law was adopted, for the presumption is some legal method was pursued. Some decisions hold that no personal notice need be given in any event, taking the position that the proceeding is a proceeding in rem. The decisions in Indiana lay down the rule that it is for the legislature to say what the character of notice shall

be. The statute under which Elmira Street was established provided for the notice to the "owner or agent." Appellant does not negative the presumption that its agent was not notified. It is alleged "that this defendant says that said notice was not served upon the Terre Haute & Logansport Railroad Company, which then owned said land and said railroad, and it did not, by any officers, agent or attorney attend said meeting of the commissioners, nor any meeting of said Board of Trustees at which any proceedings were had in respect to the location of said street," but it is not alleegd that its agent was not duly notified. It is further alleged "that it was not and did not become a party to said proceedings in any manner whatsoever," which allegation is a legal conclusion, or, at most, a mere conclusion or deduction from facts not pleaded, and hence cannot be considered when marshaling facts relied upon to overcome the legal presumption of the validity of the proceedings. However, if the language last quoted is treated as an allegation of fact, to say that appellant "did not become a party to said proceedings" does not negative the presumption that an agent did not become a party to the proceedings. Nor does such an allegation, whether considered as a legal conclusion or a deduction from facts not pleaded, negative the presumption that notice, if not given directly was had constructively, by publication or posting, a statutory method of giving notice to an "unknown owner," and unless negatived, it will be presumed, as against this collateral attack, that the board found the owner to be unknown, and was notified constructively.

We now pass to the question of want of notice to the mortgagee, Benjamin Harrison. The authorities cited and argument made against the construction of the return and answer so as to make it a denial based upon want of notice to the company, apply with equal force to construing it as a denial based upon want

of notice to the mortgagee, but in addition, we maintain that it was within the legislature's power to say what notice should be given in highways proceedings; that the leigslature in the statute heretofore quoted named the "owner or agent" as the only parties entitled to notice. It did not name the mortgagee. The latter took the mortgage subject to the condition that the property might be condemned on notice to either the owner or agent of the property; that is, the statute created the owner or agent of the mortgaged property, the agent of the mortgagee for the purpose of service of notice in such cases. Elliott ,Roads and Streets Sec. 199, supra, Indianapolis, etc. R. R. Co. v. State Supra, McEneney v. Town of Sullivan, supra.

But let us admit that the mortgagee was entitled to notice as an "owner;" that within the meaning of the statute it was not notified as alleged, still the answer would not be good because the board had the right to serve notice on the "agent," and this fact is not negatived. It will be presumed that if the mortgagee was not notified personally, that some other legal notice was had either by notifying an agent or by publication or posting, the board having found the mortgagee (owner) to be "unknown."

Another forceful, and, to our mind, conclusive objection is that plaintiff in error is not in position to raise any question with reference to want of notice to the mortgagee. One interested person cannot take advantage of the want of notice to another interested party. Encyc. (1st. Ed) Vol. 24, p. 22, and citations heretofore made. Plaintiff in error is not the mortgagee nor assignee of the mortgage, nor in any way privy to the mortgagee. How can it complain of want of notice to Benjamin Harrison, mortgagee, when the only relation to the property was that of a lien holder, and he, to satisfy that lien, invoked the aid of the court,

which divested the mortgagor of title and vested it in Brooks, the purchaser, predecessor in title of plaintiff in error.

The position of plaintiff in error is, under the decisions of Indiana, without notice to the mortgagee, as to him (plaintiff) the proceedings are void. Of the cases cited to sustain this proposition Sherwood v. City of Lafayette, is the only one that bears upon the point. This was a proceeding by the mortgagee to enforce his mortgage lien against the funds realized from the mortgaged property, and the lien was sustained. But it is a long call from holding that a mortgagee may follow the funds realized from the mortgaged property to holding that a remote grantor of property can establish the invalidity of highway proceedings by showing that a mortgagee of a predecessor in title whose claim had been fully satisfied was not made a party. Counsel cite no authority to sustain the latter proposition, for there is no authority, nor is it the law. The other cases cited we dismiss with the general assertion that the statements of fact vary so widely from the facts of the case at bar that they are not authority.

Again, the Vandalia Railroad Company makes its first appearance in this case by assignment of errors in the Supreme Court of the State (Rec. P. 24). In that pleading it is averred that the Vandalia Railway Company, the Terre Haute & Logansport Railroad Company, and various other corporations, all created and organized under the laws of the State of Indiana, have been consolidated into a railroad corporation organized under the laws of the State of Indiana, and named the Vandalia Railroad Company. This pleading does not give the date of such consolidation, and as the pleading must be taken most strongly against the pleader, it must be so construed as to carry the date of the consolidation back prior to the condemnation

proceedings in 1891, and in that way account for the fact that the Vandalia Railroad Company was made a party to that proceeding and served with notice. The pleading must be so interpreted under the established rules of construction. The pleading avers the consolidation and that by authority of it the Vandalia Railroad Company "has succeeded to all property, rights, titles, duties and interests of the said Terre Haute & Logansport Railroad Company and in and to the subject matter of said proceedings and judgment." By that consolidation the Vandalia Railroad Company put itself in the shoes of the other company and when it did so, carried with it the notice served on the latter, September 9, 1891, informing it of the existence of the highway proceedings, and of the fact that it was a party thereto. A consolidation of railroad companies is a consolidation of everything pertaining to them, such as notices of proceedings, and especially, in the language of the pleader, of all property, rights, title, duties and interest.' The consolidated company cannot hold with one hand and reject with the other. The notice given to the Vandalia in September, 1891, whether it was then consolidated or not, will attach to it in its consolidated existence. To say the best that can be said for the consolidated Vandalia, it took with notice for the notice was served on a constituent company and the whole proceedings were and are of record. The Vandalia cannot in this court and at this time deny the fact that it was served with notice. It has not raised the question in any other way than to take the place of the Terre Haute & Logansport Railroad Company and charge that the latter company, or rather, that its trustees and bondholders had not been served with notice. The notice served on the Vandalia was at least enough to put it on inquiry and keep it on inquiry thereafter all through the consolidation proceedings. Under au-

thorities hereinbefore cited and under the Statutes of the State of Indiana, hereinbefore set forth, when the constituent companies consolidated into the present Vandalia Railroad Company, the latter succeeded to the possession of the franchises, rights, privileges and immunities, and became subject to all the duties and obligations of each of such constituent companies. If the present Vandalia Railroad Company was not in existence in September, 1891, but there was then a Vandalia Company in existence, as appears from the alternative writ, and if that company was served with notice of the said proceedings, as the return declares then it follows that the present Vandalia, by entering into the consolidation, took upon itself the liabilities of the old Vandalia and therefore is charged with notice of the highway proceedings. The present Vandalia Railroad Company is subject to that form of liability on the part of the former Vandalia. This is but the converse of the well settled rule, that the rights of action of the old company are transferred to the newly consolidated company, and may be enforced by it under its new name. Cumberland College v. Ish. 22 Cal. 641. University of Vt. v. Baxter, 42 Vt. 99.

The names, Vandalia Railroad Company, Vandalia Railway Company, and Terre Haute & Logansport Railroad Company: It is a matter of common knowledge in and about South Bend that the plaintiff in error, whatever its true corporate name may have been from time to time, has, ever since its construction into the city of South Bend, long prior to the institution of the highway proceedings before the Board of Trustees of the town of Myler, been and still is popularly known as the Vandalia. This was true at the time of the service of the notice in the highway proceedings; in fact the railroad has never been commonly known by any other name than the Vandalia. It advertised un-

der that name. On the very date that the notice in the highway proceedings was served, Sept. 9, 1891, it published its time table in the South Bend Daily Tribune and Times, the city's leading newspapers, under the name, Vandalia. All this must be admitted by plaintiff in error; it cannot be successfully controverted, and the marshal's return shows service upon the Vandalia, no doubt because it was the name most familiar to him. He was taught it by the railroad itself. Taking judicial knowledge of these facts, it is patent to this court that it is not true, as asserted by plaintiff in error, that the Terre Haute & Logansport Railroad Company had no notice of the highway proceedings. It had notice. The only irregularity there is in the notice is that the marshal makes the return in the name the company itself adopted for popular use. Such irregularity does not invalidate the proceedings. The best that can be said for the defense is that it is technical, not meritorious. But under the adjudicated cases, such defense cannot prevail. Under the authorities cited it is established law that courts will take judicial knowledge of the popular name of railways. The return of the marshal of the town of Myler shows service of notice in the Vandalia Railway Company, and under that return the proceedings were had, and, we submit, the Board of Trustees of the town of Myler were legally justified in holding that the Vandalia Railway Company and the Terre Haute & Logansport Railroad Company were identical and in this collateral attack upon the highway proceedings the court below would have been, and, this court will be legally justified in finding that the notice was served upon the predecessor of the plaintiff in error under the popular name of the Vandalia Company, and for information to establish that fact, may resort to such means of investigation as may be deemed proper.

In this view of the law, there was proper notice served upon the Terre Haute & Logansport Railroad Company and the allegations in the return, with reference to want of notice, are without force.

In recapitulation we maintain:

First: That this court is without jurisdiction for the reasons hereinbefore assigned.

Second: That, if jurisdiction should be held to attach, that there was such notice given in the highway proceedings to plaintiff in error or its predecessor in title, as to bind it in this proceeding.

We submit, therefore, that the writ of error should be dismissed, or upon assumption of jurisdiction of the cause, that the finding of this court on the merits should be for the defendant in error.

Respectfully submitted,

FRANK H. DUNNAHOO.
HARRY R. WAIR,
W. W. DUDLEY,
L. T. MICHENER.
Attorneys for Defendant in Error.

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Argument 35

Mr. Samuel Parker, with whom *Mr. John G. Williams* was on the brief, for plaintiff in error:

There was a denial by the state Supreme Court of an authority exercised under the United States, in that such court refused to consider and thereby, in effect, decided against the title and right of plaintiff in error, specially set up and claimed under such authority. That court refused to consider, and by so doing decided against, the title and right of the plaintiff in error to the free and unincumbered use of that part of its right of way and railroad over which it is claimed said Calvert street exists, its title and right to said right of way and railroad having been acquired under and by force of the judgment and decree of the Circuit Court of the United States, all as specially set up and claimed. Sec. 709, Rev. Stat.; *Dupasseur* v. *Rochereau*, 21 Wall. 130; *Crescent City &c. Association* v. *Butcher's Union &c. Co.*, 120 U. S. 141; *Pittsburg &c. Ry. Co.* v. *Long Island &c. Co.*, 172 U. S. 493.

The return of the railway company to the alternative writ of mandamus, after averring the facts constituting the first ground for the assertion that this court has jurisdiction, makes the direct and positive allegation of the existence of a Federal right in the following words: "And this defendant says that in this action it is sought to appropriate its property acquired by virtue of the decree aforesaid rendered in the Circuit Court of the United States, for the District of Indiana, without due process of law and without compensation, in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant now claims immunity under said Fourteenth Amendment from having its property taken from it by means of this action without compensation and without due process of law." This would seem to meet even the stringent requirements of the earlier cases in this court, of which *Maxwell* v. *Newbold*, 18 How. 511, is an example. Upon this ground, viz.: That the state court decided against the immunity claimed under the constitution, the return leaves nothing to inference but the averments are so

distinct and positive as to place it beyond question that the party bringing the case here . . . intended to assert a Federal right. *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648; *Green Bay & M. C. Co.* v. *Patten Paper Co.,* 172 U. S. 58.

The state Supreme Court declared that the return to the alternative writ was based upon the theory that the contract between the railway company and the city of South Bend, relator, was a bar to the action for the mandate, and, having so declared, held that the conclusion reached forbade a discussion of the legality of the various steps taken in the proceedings to establish Elmira street, as well as the constitutional question raised. This amounts to, and, in effect, is a decision against the Federal right and immunity claimed. *Minneapolis &c. Ry. Co.* v. *Gardner,* 177 U. S. 332; *Covington & L. Turnpike Road Co.* v. *Sandford,* 164 U. S. 576; *Mitchell* v. *Clark,* 110 U. S. 633, 645; *Kaukauna Water Power Co.* v. *Green Bay &c. Canal Co.,* 142 U. S. 254; *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Grimwood,* 200 U. S. 561.

Mr. Harry R. Wair and *Mr. L. T. Michener,* with whom *Mr. Frank H. Dunnahoo* and *Mr. W. W. Dudley* were on the brief, for defendant in error:

The decision of the state court was placed upon an independent ground not involving in any way a Federal question and that ground is sufficient to sustain the judgment. The Federal question, if any, lay behind the determination of the question of the character and theory of the pleading. Plaintiff in error could not complain that because of the construction of the pleading the real issue was held to be the validity of the contract and not the Federal question now asserted. *Chapman* v. *Crane,* 123 U. S. 540; *Brooks* v. *Missouri,* 124 U. S. 394; *Johnson* v. *Risk,* 137 U. S. 300.

Whether the construction of the pleading as made by the state Supreme Court, or its finding upon the validity of the contract, were sound or not, is not for inquiry here. The basis of the decision is broad enough in itself to support the final

judgment without reference to the alleged Federal question. *Beaupre* v. *Noyes*, 158 U. S. 397, 401; also *Klinger* v. *Missouri*, 13 Wall. 257, 263.

All causes of action originating in the state courts and in the inferior Federal courts are, and necessarily must be, subject to the rules of pleading obtaining in the particular jurisdiction, and it is for the state court to say whether the particular defense has been sufficiently alleged as measured by the rules applicable to the pleading obtaining in the State.

If the defense is founded upon a Federal question it must have been presented, not only in the Supreme Court of the State, but before the trial court. *Chappel* v. *Bradshaw*, 128 U. S. 132.

All allegations in the pleading which go beyond the statement of a good defense upon the theory adopted are mere surplusage and when the statements of the defense, tested by the rules of good pleading do not disclose that a Federal question is involved, the Federal court has no jurisdiction. *City of Fergus Falls* v. *Fergus Falls Water Co.*, 72 Fed. Rep. 873. See also *Hovey* v. *Elliott*, 167 U. S. 409; *Chouteau* v. *Gibson*, 111 U. S. 200; *T. & P. Ry. Co.* v. *Southern Ry. Co.*, 137 U. S. 48; *Speed* v. *McCarthy*, 181 U. S. 613; *Union Pac. Ry.* v. *Pain*, 119 U. S. 561; *Sayward* v. *Denny*, 158 U. S. 180.

If the question of the sufficiency of the pleading should be held to be subject of review by this court, the reasons assigned by the state court for holding the pleading insufficient to present Federal questions are sufficient, treating the matter as an original question here, to impel the same finding by this court.

MR. JUSTICE BREWER delivered the opinion of the court.

This action was commenced by the defendant in error in the Circuit Court of St. Joseph County, Indiana, to compel the Terre Haute and Logansport Railway Company to open its tracks and yards within Calvert street in South Bend, to

make the roadbed conform to the street grade, to plank the crossing of the same, and to make that crossing safe and convenient for the passage of persons and vehicles. While the action was pending in the state courts the Terre Haute company and certain other companies consolidated and formed a new corporation under the name of the Vandalia Railroad Company, which succeeded to all the rights and duties of the original defendant, carried on the further litigation, and is the plaintiff in error.

Upon the complaint an alternative writ of mandamus was issued. To this writ and the complaint the railroad company demurred, and the demurrer was overruled. The company then filed its return to the alternative writ, and a demurrer of the plaintiff thereto was sustained. The railway company refusing to plead further, a peremptory writ of mandamus was issued as prayed for. On appeal to the Supreme Court of the State the decision of the Circuit Court was affirmed. 166 Indiana, 219. Thereupon this writ of error was sued out.

To fully understand the questions presented a statement of the matters set forth in the complaint and return is necessary.

The complaint alleges that on November 10, 1884, the city granted a franchise to the railway company to cross the streets and alleys of the city on the express condition that when it did so the roadbed should be made to conform strictly to the grade of the street or alley it crossed, and that the defendant should so construct and maintain its road at such crossing as to cause the least possible obstruction to the passage of persons and vehicles over it; that the railway company accepted said franchise and had ever since acted under it.

It further described that portion of the street whose grade had been established and which was occupied by the defendant, and which it had been notified to plank and improve.

The demurrer to the writ raised the question whether the action was not founded alone upon the contract created by the franchise, and asserted that the duties of a corporation springing wholly out of contract cannot be enforced by writs

of mandamus; also whether the plaintiff could not of itself have constructed the crossing and brought an action for the cost thereof and the penalty as provided in the ordinance, and thereby secured adequate redress without resorting to the extraordinary remedy of mandamus. But obviously these matters are of a local nature and present no question under the Federal Constitution.

The return of the defendant alleged that at the time the original franchise was granted the place at which the improvement of the crossing was sought to be compelled by this action was outside the limits of the city of South Bend; that in 1887 it was taken into the corporate limits of the town of Myler, and thereafter, in 1892, said town of Myler was annexed to and became a part of the city of South Bend; that before this annexation and while the town of Myler existed certain parties filed with the board of trustees of that town a petition for the establishment of a street, at first called Elmira, but afterwards Calvert street, over the ground where the plaintiff now claims said street is located; that the Terre Haute and Logansport Railroad Company, then the owner of the real estate, had no notice of the proceedings had for the establishment of said street and took no part therein; neither did it receive any compensation on account thereof; that prior thereto that company had placed a trust deed on the property, which, after the attempted establishment of the street, was foreclosed by suit in the United States Circuit Court for the State and District of Indiana, and the property purchased by one Joshua T. Brooks, who directed a conveyance to the Terre Haute and Logansport Railway Company, the defendant herein; that neither the trustee in said trust deed nor any holder of bonds secured by it was a party to the proceedings for the establishment of said street, nor was any notice of said proceedings given to said trustee or any bondholder, nor did either have any knowledge thereof; that no damages for the opening of the street were assessed or tendered to either, and that at the time of the purchase of the property and the payment of the

purchase price neither the purchaser nor the railroad company nor the defendant had any knowledge of the proceedings to locate and open the said street. A violation of the Fourteenth Amendment was in terms claimed in that an appropriation of its property acquired by the proceedings in the Federal court was sought to be made without compensation. The return further set forth that, springing out of these facts, there was a dispute between the railroad company and the city of South Bend as to the validity of the proceedings for the opening of said street, and that "on January 17, 1902, for the purpose of adjusting and settling the said conflicting claims of the relator and settling the said conflicting claims of the relator and the defendant, the relator, acting by its then board of public works, made and entered into a contract whereby the defendant agreed to construct a steel viaduct, above and across its tracks at said Elmira street where claimed by the relator, and the relator agreed to construct the approaches thereto and each agreed to perform the other agreements set forth in said contract, which is in writing and which was reported to the common council of said city of South Bend, which, by ordinance duly passed and enacted, ratified and approved said contract. Said ordinance and said contract are in the following words and figures, to wit: 'Ordinance. An ordinance ratifying a contract between the Department of Public Works and the Terre Haute and Logansport Railway. Be it ordained by the Common Council of the City of South Bend, that the within contract, made on the 17th day of January, 1902, between the Department of Public Works and the Terre Haute and Logansport Railway Company is hereby ratified and approved. This agreement made this 17th day of January, 1902, between the City of South Bend, by and through its Board of Public Works, and the Terre Haute and Logansport Railway Company. Witnesseth,'" etc. The return further averred that the defendant was ready at all times to construct the said viaduct according to said contract and ordinance, but the city had not performed any of the agreements contained

in said contract to be performed by it, and that it had not given to the defendant any written or other notice to construct the viaduct according to the provisions of said contract.

In reference to this return the Supreme Court in its opinion made this statement of the contention of the parties (p. 229):

"Appellant's counsel assert and argue an insufficiency of the notice and return of service in the special proceedings of the board of trustees of the town of Myler for the establishment of Elmira street, a want of notice to the mortgagee of the property to be appropriated, and, in consequence, a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

"Appellee's counsel insist that the only question presented to and considered by the Circuit Court upon the demurrer to the return was the validity of the agreement therein pleaded."

It declared that the appellee's view was the correct one, and that the only question to be considered was the validity of the agreement therein pleaded. It then proceeded to discuss its validity, holding that it was beyond the power of the city, saying: "The agreement entered into between the relator and the railway company was on the part of the city an unwarranted surrender of legislative power and control over the crossing, and an unauthorized assumption of the burdens of another, and is invalid and void."

It is now contended on the part of the defendant in error that no Federal question was passed upon by the Supreme Court of the State and that, therefore, the writ of error should be dismissed, while the plaintiff in error insists that there are two Federal questions; first, whether the state court gave due effect to the proceedings of the Federal court in the foreclosure and sale of the property under the trust deed; and second, whether the proceedings for the opening of the street were had without notice to the defendant and its predecessor, and so operated to take private property without compensation. This involves a consideration of the meaning and scope

of the return. It is true that in that return it is alleged that no notice was given to the railroad company or its predecessor or the trustee in the trust deed or any bondholder, and that therefore there was no valid appropriation of the property of the railroad company to street purposes. It is also stated that by the foreclosure proceedings in the Federal court the full title to the property passed to the defendant, a title which in its origin antedated the attempt to open the street. But the Supreme Court held that these were merely matters of inducement leading up to the making of the contract for a viaduct; that they were only presented for the purpose of showing the state of the controversy, which was settled between the parties by the making of this alleged contract. In other words, it did not pass upon the Federal questions, but held that they were put entirely out of the case by facts set forth in the return presenting a question obviously not of a Federal character.

Now, the construction of a pleading, the meaning to be given to its various allegations and the determination of the validity of a contract made by parties in reference to real estate in the State are, as a rule, local questions. Doubtless this court is not concluded by the ruling of the state court, and must determine for itself whether there is really involved any Federal question which will entitle it to review the judgment. *Newport Light Company* v. *Newport*, 151 U. S. 527, 536, and cases cited in the opinion. A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings, but that is not this case. Even if it be conceded that the conclusion of the Supreme Court of the State is not free from doubt, there is nothing to justify a suspicion that there was any intent to avoid the Federal questions. The construction placed by that court upon the pleading was a reasonable one. It said in reference to the matter (166 Indiana, 229):

"The manifest theory of the pleader was to show that a reasonable and *bona fide* controversy existed as to the validity

of the proceedings for the establishment of Elmira street by the board of trustees of the town of Myler, as an inducement to and consideration for entering into the compromise agreement pleaded, and that said contract having been legally executed and not rescinded, the railway company was thereby absolved from the duty declared upon, to construct and maintain a grade crossing at the point in controversy. 'A single paragraph of answer cannot perform the double function of denying the cause of action, and confessing and avoiding it. It must be one thing or the other, but it cannot be both; and its character, in this respect, must be determined from the general scope of its averments.' *Kimble* v. *Christie*, 55 Indiana, 140, 144. The return under consideration was intended to confess and avoid the duty sought to be enforced, and its sufficiency must be determined upon that theory. This conclusion forbids a discussion of the legality of the various steps taken in the proceedings to establish Elmira street, as well as the constitutional question raised."

We think it must be held that the decision by the Supreme Court of the State was placed upon a sufficient non-Federal ground, and therefore the writ of error is

Dismissed.